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A legal history of inter-local conflict of laws in Africa south of the Sahara, from earliest times to 1960

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**A LEGAL HISTORY OF INTER-LOCAL CONFLICT OF LAWS IN AFRICA
SOUTH OF THE SAHARA, FROM EARLIEST TIMES TO 1960**

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**A Thesis Submitted as an Internal Student of the University of London in Final
Fulfilment of the Requirement for the Degree of Doctor of Philosophy**

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A. C.	Appeal Cases (Privy Council)
A. E. F	Afrique Equitoriale Française
All E.R.	All England Law Reports
Am. J. Comp. Law	American Journal of Comparative Law
A. O. F	Afrique Occidentale Française
BYIL	British Yearbook of International Law
C. A.	Court of Appeal
C. C.	Current Cases (Ghana)
Ch. D.	Chancery Division
Columb. L. Rev.	Columbia Law Review
D. Ct.	Divisional Court (Gold Coast)
D. Ct. '21 – '25	Judgments of the Divisional Court (Gold Coast Colony) 1921 – 1925
D. L. R.	Dominion Law Reports
E. A. C. A.	East African Court of Appeal
F. Ct.	Full Court (Gold Coast)
F. Ct. '20 – '21	Full Court, 1920 – 1921 (Gold Coast Colony)
F. S. C.	Federal Supreme Court (Nigeria)
G. L. R.	Ghana Law Review
H. Ct.	High Court (Ghana)
J. A. L.	Journal of African Law
K. L. R.	Kenya Law Reports
L. R. P & D	Law Reports Probate & Divorce
M. L. R	Modern Law Review
N. L. R.	Nigerian Law Reports
N.L.C.D	National Liberation Council Decree (Ghana)
N. N. L. R.	Northern Nigerian Law Reports
N. R. H. Ct.	Northern Rhodesia High Court
Nig. L. J	Nigerian Law Journal
Ny. L. R.	Nyasaland Law Review

P	Probate
P. L. D.	Pakistan Law Digest
Rec. des cours	Recueil des cours (Hague Lectures)
Ren.	Renner's Reports (Ghana)
R. G. L.	Review of Ghana Law
R & N.	Rhodesia and Nyasaland Law Reports
S. Ct. Southern Nigeria	Supreme Court of Southern Nigeria
Sar. F. C. L.	Sarbah's Fanti Customary Laws (Gold Coast)
Trib. gr. inst.	Tribunal de grande instance
U. L. R.	Uganda Law Review
W. A. C. A.	West African Court of Appeal
W. A. L. R.	West African Law Reports
W. L. R	World Law Reports

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ABSTRACT

The subject of this dissertation is, “**A Legal History of Inter-local Conflict of Laws in Africa South of the Sahara, from Earliest Times to 1960**”. Although inter-local conflict of laws is a frequent legal experience in Africa, the subject is rarely examined by African lawyers. Indeed, although the various customary law rules are often pleaded in court, judges often fail to characterise with the same rigour that is found with international conflict of laws.

The examination of the subject starts with an introduction explaining the purpose of the study of the subject and goes on to explain the terminology used in the study. Law in Africa differs in many ways from law in Europe, especially in the terminology used. “Customary law”, for example, assumes an importance unfamiliar to most European lawyers.

To appreciate the importance of inter-local conflict of laws in Africa, it is essential to understand the characteristics of African legal systems. African legal systems derive from agricultural communities, which are often collective or communal in nature. These communities usually have their own legal rules on various issues, rules which may differ from those of a neighbouring community, thus creating a source of conflict of laws.

The political organisation of African societies also explains why inter-local conflict of laws is so important in African legal systems. African societies are organised in small units on which a superstructure is imposed to look like one kingdom or empire, such as Ghana or Mali were. Chapter two explains these various types of societies, which most often, have different legal norms on various issues such as succession, status, family law and so on. This is the major source of inter-local conflict of laws in Africa.

The arrival of Islam, along with its own legal system, has also added to the sources of inter-local conflict of laws. In West Africa, the power of Islamic law or the Sharia, is limited mainly to the northern regions of Nigeria. This is due to the fact that Islam was introduced to West Africa by missionaries, except in Northern Nigeria, where it was introduced through a *jihad* or holy war. Although the hold of Islamic law on West

Africa has remained weak, nevertheless, it is a source of conflict of laws. In East Africa, Islam was introduced by settlers from the Middle East, who practise the religion and legal system among themselves and the converts they have made. In East Africa, these conflicts situations were dealt with mainly by legislation but sometimes, they were also dealt with by the courts.

Another source of conflict of laws were European legal systems, introduced by England and France. Although British and French colonial governments permitted African legal systems to continue functioning, there were areas of conflict.

In this thesis, inter-local conflict of laws is treated as a variant of private international law. Thus, the rules of private international law are examined to demonstrate that they do not differ from those of inter-local conflict of laws. The two types of conflict of laws are the same, except that their theatres of operation differ.

Approaches to choice of law in the British and French colonial period differ in many ways. To the French, choice of law was part of colonial policy. Each person in a French colony had a status, which was his or her personal law. Race was the main factor in acquiring a status but often, Africans were encouraged to assimilate into French culture and civilisation. British colonial policy was not that well organised, especially in West Africa. There were only two types of status, "native" and "non-native". The connecting factor for a "native" was his or her customary law and for the "non-native" the common law. Race was not the deciding factor, as foreign blacks did not necessarily qualify as "natives". These approaches to choice of law produced radically different results, some of which have survived to the present.

The examination of the subject stops in 1960, on the eve of the independence of most African countries. However, the main reason for choosing that date is the enactment of Ghana's post-independence choice of law rules, the first post-independence choice of law rules in Africa. These innovative rules, discussed in Chapter Six, demonstrated a departure from the colonial approach. A new connecting factor "community" was created to replace "tribe" and similar usages, which were applied in the colonial era. The "repugnancy clauses" which, in the colonial period prevented or limited the application of certain local customary law rules, were removed, thus restoring the

court's inherent right to apply "public policy" to refuse the application of a "foreign law".

The hopes generated in 1960 did not last long. Very few African countries followed Ghana's example to enact new choice of law rules, as shown in the appendix to this dissertation. The few new choice of law rules which were enacted, departed little from the colonial format. Thus, most African lawyers would still need to refer to the colonial rules for guidance. Even Ghana itself has enacted a new set of choice of law rules, reproduced in the appendix, and has brought back the "repugnancy rules", although most of the 1960 rules have been retained. In the circumstances, an examination of the colonial choice of law rules is appropriate, mainly to discover how they can be applied in modern times.

Most modern states in Africa today are of colonial creation. Thus, they contain a number of cultural units which, left alone, could have developed into states of their own. Nevertheless, even if colonialism had never come to Africa, there were state formations in progress, such as the Ashanti or Zulu empires, which would have created similar inter-local conflict of law situations that colonialism brought with it.

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Acknowledgements often make disappointing reading mainly for the omission of names of people who have contributed in so many ways for the work produced. These acknowledgements are no exception and I must start by apologising to those whom I have not mentioned.

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CHAPTER ONE

GENERAL INTRODUCTION

I. INTRODUCTION

Virtually every country in Africa has a plural legal system. Consequently, there are conflicts between the legal systems and laws of general application. The conflict occurs when a legally relevant event takes place in various law districts, subject to different legal systems within the one sovereign state and the judge is called upon to decide which of the competing laws is to govern the issue. In Africa, there are ample opportunities for an event to take place in various legal systems. The reasons are mainly historical. The political organisation of African societies is such that a state unit, such as Ashanti or Yoruba, is composed of several autonomous smaller units, complete with their own legislative and judicial machinery.

Secondly, the partition of Africa and the creation of the modern state system has increased the number of local legal systems, since modern states are usually larger and incorporate several state units. The partition and colonisation of Africa also introduced European legal systems into Africa.

Thirdly, there is a constant movement of people from one legal district to another, mainly in search of employment and this has led to intermarriage and acquisition of property in the "foreign" law district.

II. Purpose of this Study

The main purpose of this study is to analyse the evolution of choice of law in Africa, to ascertain the principles which underlie the choice of law rules in African inter-local conflict of laws in the pre-colonial (wherever possible), the colonial and part of the post-colonial period. Choice of law rules in operation before the colonial period are difficult to obtain but European and Arab traders have left some insight into the period and whenever possible, these will be examined. For the purpose of this study however, the more important periods are the colonial and Ghana's immediate post-colonial experience.

The choice of law rules in inter-local conflict of laws have changed little in Africa since the colonial period. Indeed only a small number of countries have enacted new choice of law rules and even those which have, have retained some of the salient concepts of the old rules. The result is that most African countries would still have to rely on the colonial rules for guidance in inter-local conflict of laws. To be able to apply the colonial rules to modern social needs, it is suggested in this dissertation that the rules of private international law be relied upon for interpretation purposes.

III. Focus of Study

This study focuses on choice of law in English-speaking and French-speaking Africa south of the Sahara. Due to language difficulties, Portuguese-speaking Africa has been excluded and so has South Africa, due to the complex history of that country.

Inter-local conflict of laws is not popular with private international lawyers, perhaps because it occurs so rarely. Indeed some have even argued that conflict of laws in a unitary state is not conflict at all. This study seeks to show that the conflict situation in inter-local conflict of laws is as real as that in the international situation. A short history of private international law has been sketched to demonstrate that rules of the same nature apply to the two types of conflicts. This may prove important for African lawyers who may have to adapt outdated colonial legislation to modern needs.

Emphasis has been laid on events in Ghana and Sénégal for several reasons. First, the earliest choice of law rules in British African colonies were enacted for the Gold Coast (Ghana) in 1876¹, rules which were widely copied all over the British colonies. In the same way, the French also used Sénégal as a platform to legislate for the rest of their colonies. Thus, the law of a colony would simply refer to the Sénégalaise version and apply it as it was applied in Sénégal².

¹ Supreme Court Ordinance, No. 4 of 1876.

² See Chapter Five, "Reception of French Law".

Second, it is hoped that by emphasising colonial policy in the Gold Coast and Sénégal, the difference in British and French colonial attitudes would be more clearly exposed. British and French colonial policy differed in many ways and Ghana and Sénégal appear to mirror these differences more closely than most other colonies.

Third, because judicial activity began in the two colonies much earlier than in others, it has been found easier to collect court records and case law on these two countries³.

IV. Terminology used in this Study

i) *Conflict of Laws*

Although not all legal writers are agreed that international conflicts rules should apply to internal conflicts, they agree, however, that the designation "conflict of laws" can be applied to inter-local conflict of laws, for the term;

"Conflict of laws must be understood in the figurative sense, it is a simile which indicates that the fact or legal relation governed by the law is attached to several legal systems and what has to be decided is which of the legal rules of several systems has to be applied to the actual case. This multiplicity of legal systems may imply the legal systems of two sovereign states or it may refer to two legal systems in force within one sovereign territory"⁴.

³ See Chapters Five and Six.

⁴ Szaszy; *The Conflict of Laws in Western, Socialist and Developing Countries*, 1974, p.

ii) *'Inter-local' Conflict of Laws*

The term 'inter-local' conflict of laws has been used in this dissertation in preference to other designations which Professor Zsasz has suggested, such as inter-zonal, interstate (for federal states), or inter-sectorial⁵. 'Inter-local' has been found more appropriate for this study because it reflects the existence of law districts based on the historical experiences of Africa.

iii) *'Customary Law'*

The term 'customary law', which is used in most legal writings on Africa to describe African legal systems, will not be used in this dissertation to reflect law in Africa but will be used, where appropriate, to describe particular legal systems or where the African legal system itself uses the term in its legislation⁶. According to the Oxford English Dictionary, custom is:-

"An established usage which by long continuance has acquired the force of law or right".

Defined this way, every legal system derives some source from custom but for some reason, legal writers on law in Africa tend to see African legal systems as being comprised entirely of customary rules which evolve slowly and perhaps, randomly. If that were the case, African legal systems would take long periods to evolve but this is not the case. Gluckman observes that:-

"The view that customary law was ancient and immutable retaining its principles through long periods of time, its origins lost in the midst of antiquity, has been discarded"⁷.

²⁵.

⁵ *ibid*, at p. 233.

⁶ See Native Courts Ordinance 1944, Cap. 98 for the Gold Coast which defines "native customary law".

⁷ Gluckman; *Ideas and Procedures in African Customary Law*, 1969, p. 9.

and he continues,

"Not only are customary laws changing today but also they were subject to constant change in the pre-colonial past"⁸.

Nevertheless, Gluckman refers to African legal systems as 'customary law' throughout his book. It is reasonable to assume that laws which are constantly changing can only do so through a mechanism specially created for the purpose. The process is unlikely to be left to the random and leisurely pace of custom.

One of the major characteristics of African legal systems is their uncoded nature. Gluckman, like most other writers on law in Africa, fails to distinguish between the uncoded nature of African legal systems and the unwritten nature of customary law generally. Indeed quite often, when the term 'customary' law is used, what is meant is unwritten not uncoded law;

"Lorsqu'on dit que les droits africains sont des droits coutumiers, en réalité on veut dire qu'ils sont des droits non écrits"⁹.

Customary law may be unwritten but unwritten law is not necessarily customary law. Custom is only one source of law and there is substantial evidence that African legal systems know other sources of law, one of which is legislation. Indeed Elias argues that legislation has been known to African legal systems since ancient times;

"...the absence of ancient codes or written laws in Africa does not necessarily presage a static condition of customary law, nor are we justified in refusing the name of legislation to such processes of legal change as are found to be

⁸ *ibid*, at p. 9.

⁹ Gonidec, P. F; *Les droits africains - évolutions et sources*, 1968, p.15.

operating in African societies at various stages of their legal life"¹⁰.

Legislation ought not to be so narrowly defined that it can apply only to a written piece of law. Most African societies know different methods of producing legislation and Elias has identified at least five of these;

- (a) as the personal decree of the reigning king or chief; or
- (b) as joint resolution of the king's advisers in consequence of deliberation in executive council; or
- (c) as the *ad hoc* proclamation by a spokesman of certain internal bodies, such as secret societies and market guilds; or
- (d) as the authoritative declaration of specific regulations arrived at after due debate at a public concourse of chiefs, elders and the general public summoned together for the purpose; or
- (e) as the judicial modification of old rules in the course of settling disputes arising out of new circumstances¹¹.

The importance of custom, as a source of law, diminishes as legal systems grow and become more complex. The persistent reference to African legal systems as customary law systems, resembles the situation which once existed in England when "...the identification of the common law with customary law remained the accepted doctrine long after it had ceased to retain any semblance of truth"¹². "Customary Law" as a term includes all customs which are applicable in a society but not all of them may be enforceable by a court of law. This study concentrates on law which is enforceable in the forum's court and treats custom only as source of law. It is however important to examine what was understood under 'customary law' during the colonial period and since the enactment of Ghana's Courts Act 1960.

Although colonial legislation often referred to 'native law and custom' or 'customary law', no attempt was made to define the expression until 1927, when the Gold Coast Colony

¹⁰ Elias, T. O; *The Nature of African Customary Law*, 1956, p. 189.

¹¹ *ibid*, at p.191.

¹² Salmond; *On Jurisprudence*, 12th Ed. 1966, p. 189.

Native Administration Ordinance was enacted¹³. Section 2 of the Ordinance defined native customary law as follows;

“ ‘Native customary law’ means a rule or a body of rules regulating rights and imposing correlating duties, being a rule or a body of rules which obtains and is fortified by established native usage and which is appropriate and applicable to any particular cause, action, suit, matter, dispute, issue or question, and includes also any native customary law recorded as such in a statement which shall have been declared under section 123 to be a true and accurate statement of such native customary law.”

The provision was re-enacted as the Native Courts (Colony) Ordinance of 1944 of the Gold Coast¹⁴. The Eastern Region of Nigeria adopted it in abbreviated form as the Eastern Region of Nigeria Customary Courts Law 1956¹⁵. Tanganyika (Tanzania) also adopted it as Tanganyika Local Government Ordinance¹⁶, later amended by the Local Government Ordinance¹⁷. It was also adopted by the Sierra Leone Local Courts Act of 1963¹⁸. When the Gold Coast became independent Ghana in 1957, the provision was replaced in 1958 by the Local Courts Act 1958¹⁹, Section 2 and finally by the Interpretation Act 1960²⁰ which now provides as follows;

“18 – (1) Customary law, as comprised in the laws of Ghana, consists of rules of law which by custom are applicable to particular communities in Ghana not being rules included in the common law under any enactment providing for the assimilation of such rules of customary law as suitable for general application.”

In the colonial period, the Gold Coast provision remained the most helpful, although other

¹³ No. 18 of 1927.

¹⁴ Cap. 98, S.2.

¹⁵ S.2, Cap. 32.

¹⁶ Section 53A (4) (b), Cap. 299.

¹⁷ (Amendment Act 1962) No. 4 of 1962, S.13.

¹⁸ No. 20 of 1963, S.2.

¹⁹ No. 23 of 1958.

²⁰ C. A. 4.

definitions were also attempted. The Bechuanaland Native Courts Proclamation²¹, for example, provided a short definition which merely stated that 'Native law or custom' and 'Native custom' meant in relation to a particular tribe. The Northern Nigerian Native Courts Law²² defined 'native law and custom' to include Islamic Law'. Thus, it was left to the Nigerian court to determine, without guidance, when Islamic law or 'customary law' was applicable. Largely however, customary law remained undefined generally or for particular purposes.

Faced with the notion of 'customary law' which colonial courts were required to enforce, the colonial judges, who were English, had little option but to rely on the principles developed in England regarding custom as law. The practice in England had been, that to be enforceable, a custom must have existed since time immemorial, which was fixed at 1189 AD. Clearly this date was of no significance in Africa and judges would often rather refer to the legislation which provided for the application of customary law. Hence, a custom which did not exist when, for example, the Supreme Court Ordinance was enacted in the Gold Coast in 1876²³, would not be enforced. Thus in *Welbeck v Brown*²⁴, Smalman Smith, J, clarified the situation as follows;

"We must of course conclude that the native customs to which the Supreme Court Ordinance of 1876 requires us to give effect in the administration of the law of this colony, must be such as in the contemplation and according to the principles of English jurisprudence would be regarded as customs, that is to say, such as have existed in the colony from time immemorial, or 'to which the memory of man runneth not to the contrary'. It cannot, therefore, be contended that an observance or course of conduct which may have sprung up within the last fifty or sixty years, and which native chiefs choose to designate a custom, should have the effect of law in this colony, or should be, so to speak, crystallised into law by the action of Courts of this colony. The intention of the Legislation was, in my judgment, to give the force

²¹ No. 13 of 1942, s.1 (2).

²² 1956, Cap. 78, s.2.

²³ No. 4 of 1876.

²⁴ (1882) Sar. F. C. L. 185 (G. C, F. Ct).

of law to such customs of general and long-continued usage and observance as can be proved to have been in existence at the date of the Ordinance, and to have had at that date the essentials as well as the force of customs as by law established.”²⁵

Thus, 1876 became the date of ‘time immemorial’ for custom to pass as enforceable law. In *Mensah v Wiaboe*²⁶, 1189 was formally abandoned as time immemorial and 1876 substituted in its place. However, since the Courts Ordinance had been reviewed a number of times, does that mean that the date of recognition also changed with the date of a new enactment of the Ordinance? The Korsah Commission on Native Courts felt that at the time of their deliberations, 1951, the effective date for recognition of customary law in the Gold Coast was 1935, the date of the then current Courts Ordinance²⁷.

The situation was clearly unacceptable, if we accept that customary law evolves like any other type of law. A better approach should have been that a custom is recognised from time to time as it is pleaded at court, or as Allott puts it, customary law as is ‘existing at the time of the litigation’²⁸. This more flexible attitude to the date of recognition of ‘customary law’ began to be applied only after 1960 and is outside the scope of this study²⁹. Nevertheless, “the wind of change” had begun to be noticed even as far back as 1931, when the Privy Council observed in *Eleko v Officer Administering the Government of Nigeria*³⁰ that;

“the more barbarous customs of earlier days may under the influence of civilisation become milder without losing their essential character of custom”³¹.

²⁵ At p. 188.

²⁶ (1925) D. Ct. ‘21 – ‘25, 170, at p. 172.

²⁷ Report of the Commission on native courts, General Post Office, Accra, 1951, at p.16. Cited in Allott, p.152.

²⁸ Allott, p.152.

²⁹ It is worthwhile to note however the case of *Musa Kitonto v Kabaka’s Government*, (1965) E.A. 278, in which the East African Court of Appeal overruled the court below which had held that in determining what customary law to apply in Buganda, the Buganda Courts Ordinance, 1940, Cap. 77 (1951 Revision), was the effective date. The Court of Appeal held that customary law can grow and the Ordinance did not apply a cut-off date to that growth (at p. 281).

³⁰ [1931] A. C. 662.

³¹ *ibid*, at p. 673.

A few years later, Gray, C.J. was able to observe in *Kajubi v Kabali*³² that the *Eleko Case* applied equally to Buganda and that all that needed to be done was to substitute for "barbarous" "original" and for "milder", "modified". He went on;

"The native community may assent to some modification of an original custom, but the modification must be made with the assent of the native community. It cannot be made by an individual or a number of individuals. Least of all can it be made by a court of law"³³.

Although matters appeared to be moving in the right direction, the continued reference to local law as 'customary law' is a drawback to its development. Unfortunately, modern African legislation, such as the Ghana Courts Act 1960, continue to distinguish local law as 'customary law' even though, in the case of Ghana, it is now part of the common law of Ghana.

In this study therefore, 'customary law' as a term will be used only when appropriate.

iv) "*African Law*"

Another term frequently encountered in legal writings on law in Africa is "African Law". In the colonial period, the term was synonymous with "native law and custom", that is, the law which applied almost exclusively to "natives". In the post-colonial period, when law has general application, there is hardly any need to use the term to apply to African legal systems. None the less, Allott claims that the term is quite appropriate as there is

"...substantial similarity in the range of legal possibilities though substantial diversity in their combination, in the various customary African legal systems"³⁴.

³² (1944) 11 E. A. C. A. 34.

³³ *ibid*, at p. 37.

With respect, similarity between the legal systems alone is not sufficient to justify the use of the term "African Law", just as similarity between European legal systems, by itself, could not justify the use of the term "European Law". The term "African Law" will therefore not be used in this study except in a quotation.

V. Summary of Arguments and Conclusions

In order to understand why inter-local conflict of laws is so important to Africa, it is necessary to understand the nature of indigenous African legal systems. This is dealt with in Chapter Two, "Characteristics of African Legal Systems". African societies are complex in the sense that various ethnic groups occupy the same space. Inevitably, there are bound to be conflict of laws situations. The arrival of Islam in Africa only went to increase the number of instances in which legal rules may conflict one, with the other.

The colonisation of Africa brought the most challenging difficulties for African legal systems. These systems were not equipped to deal with the new foreign colonial systems and in time, the influence of European legal systems became remarkable. Nevertheless, the local legal systems persisted, especially in the British colonies³⁵.

Chapter Three deals with the "Relevance of Private International Law to Inter-local Conflict of Laws". Here, it is argued that the rules of private international law and inter-local conflict of laws are the same. A short historical sketch is provided to demonstrate that the humble beginnings of private international law resemble those of inter-local conflict of laws. The connecting factors, domicile and nationality, have analogies in inter-local conflict of laws, such as personal law or "community" in Ghana's 1960 choice of law rules.

Chapter Four discusses "The Choice of Law in Africa". Attempts are made to discover the atmosphere in which inter-local conflict of laws operate and their relevance for Africa. Short

³⁴ Allott; *New Essays in African Law*, 1970, p. 3. Cited hereafter as Allott.

³⁵ See later Chapter Six.

glimpses are made into pre-colonial African choice of law rules, ending with choice of law rules which were applied in pre-colonial West Africa to European traders and settlers. This may have established the basis of legal relations between West Africans and Europeans during the colonial period.

Chapter Five deals with "Choice of Law in French-speaking Sub-Saharan Africa". The chapter traces the French settlement in Sénégal in 1638 to modern times. French colonial policy is analysed and the African reaction to it discussed. The main aim of French colonial policy was to assimilate the African and turn him or her into a French person, albeit, a second-class French citizen. In this, the French largely failed but their domination is still visible. Local legal systems and laws were severely suppressed but the local legal systems have survived. The French created a hierarchy of norms, with French law at the apex. A status (*statut*) was created for all residents in the colony, with, again the French in the supremacy. The idea was to encourage local people to strive for French status but the exercise failed badly and few Africans opted for French citizenship.

Chapter Six discusses "Choice of Law in English-speaking Africa". Choice of law rules were enacted for the Gold Coast colony in 1876, permitting local "law and custom" to be pleaded at any court, not only in the "native courts". This legislation was taken over by most British West African colonies and some of the colonies in East Africa. The concept of indirect rule, practised in some colonies, further enhanced the development of local legal systems. There was no hierarchy of norms and no social status was prescribed. There were only "natives" and "non-natives" but "natives" was not defined racially, so that a Sierra Leonean African or a West Indian did not qualify as a "native". Nevertheless, the Common law and 'customary' law sometimes mixed and race was not the paramount issue, at least in West Africa. As Allott observes, conflict of laws between the common law and customary law arose because the two systems were not kept in watertight compartments.

"With the development of colonial administration the connexion between the two kinds of law grew even closer and more complex....In some territories, it was even recognised that customary law might apply to non-Africans in certain exceptional

circumstances...³⁶.

In Eastern and Southern Africa, where the colonial policy was the settlement of Europeans, colonial policy was not that liberal.

Chapter Seven examines "Choice of Law in Post-Independence Africa". Ghana was the first African country to gain its independence in 1957. In 1960, the entire legal system was reformed, including the enactment of a set of new choice of law rules. In many ways, the new rules were revolutionary. The choice of law rules introduced a new connecting factor 'community' into Ghanaian law as the basis of legal relations. The significance of the connecting factor is that it is a recognition of the territorial nature of African legal systems. People would be expected to continue to live in "communities", even though they were living away from home. Certain concepts, such as 'native' or 'non-native' were discarded.

Chapter Eight deals with two specific topics, Contract and Public Policy. The contract section deals mainly with Ghana, because the old Supreme Court Ordinance had provided for contractual relations and the post-independence Courts Act did the same. In the French-speaking countries, very little was done to promote the development of the local legal systems in the area of contract. The French had created a dual court system, so that *droit coutumier* could be pleaded only in the 'native courts', thus limiting the development of local legal systems. By 1972, Senegal, for example, abolished the application of local legal systems and replaced them with the law of nationality³⁷.

Public Policy discusses the British concept of 'repugnancy' and the French idea of *ordre public*. Public policy is not frequently applied in inter-local conflict of laws but the arrival of European legal systems meant that there would be conflicts between African and European systems. To solve the problem, the British introduced the concept that 'native law and custom' would be enforced only if it was not "repugnant to natural justice, equity and good conscience". In Eastern and Southern Africa, the concept was limited to personal relations

³⁶ Allott; pp.107 – 108.

³⁷ Law No. 72 – 061 of 12 June 1972.

but in West Africa, it applied mostly to property rights.

The French application of *ordre public* to *conflits coloniaux*, as they referred to inter-local conflict of laws in the colonies, was uncompromising. A local legal rule would not apply if it conflicted with *civilisation française*. This application of *ordre public* further frustrated the development of local legal systems in French colonies.

Chapter Nine is the concluding chapter, "Evaluation and Conclusions". The chapter discusses the view that since few African countries have enacted choice of law rules, the old colonial rules would still be applicable. This would mean that the modern court has to refer to the colonial rules whenever necessary and interpret them to suit modern needs. With progressive judicial activism, the court would have to rely on the rules of private international law as a guide. The arguments made in this dissertation are also summarised.

Appendices have been added at the end of this study mainly for reference purposes. A number of countries have enacted choice of law rules since becoming independent after 1960 and even Ghana has adopted a set of new choice of law rules. However, the major reason for reproducing the legislation is to demonstrate how close they are to the old colonial rules. The repugnancy rules have been retained and in certain instances, even the connecting factor "tribe" has remained.

CHAPTER TWO

CHARACTERISTICS OF AFRICAN LEGAL SYSTEMS

I. INTRODUCTION

In approaching law in Africa, it might be useful to ignore the political boundaries in existence at the present and concentrate on characteristics which are common to African legal systems.

The first observation to be made is that African societies before colonialism, were essentially agricultural societies and the legal systems were based on agricultural production. Very little has changed today, except that there are now urban centres. African societies are still basically agricultural and are based on the village system. A community consists of several villages, each autonomous with its own legal and administrative machinery. The Chief is the custodian of the land, which generally cannot be purchased on an individual basis³⁸. Agriculture has influenced every major institution. Thus the payment of a dowry by the prospective husband's family to the bride's family was to compensate the bride's family for the loss of a farm hand³⁹.

Another characteristic shared by African legal systems is that they operate in societies which are communal or collective in nature. Often, individual rights are subjected to the collective rights of the community. The individual and the group complement each other. Nevertheless, as Elias points out, the individual is still largely responsible for his or her legal responsibilities, even if help is given by the family or the community⁴⁰. Nevertheless, the group is not an abstract entity, just as much as the individual is not autonomous. It is this corporate nature of the African community and the individual's place in it which accounts for the uniqueness of the African connecting factor - the ancestral home. Even if a member

³⁸ Elias, T. O; *Nigerian Land Law and Custom*, Second Edition, 1953, p. 6.

³⁹ See generally Kouassigan; *L'homme et la terre*, 1966.

⁴⁰ Elias, T. O; *The Nature of African Customary Law*, 1956, pp. 87 – 90. Cited hereafter as Elias.

of the community has lived abroad all his life and by the law of another forum acquires a new domicile, his legal connection with his African community is never severed. He and his descendants remain part of it. The African domicile of origin cannot be easily displaced⁴¹.

However, the most striking feature of African legal systems is that, except for Islamic Law, they are all based on the oral tradition. As Elias points out about law in Africa;

“It is of course necessary to remember that the absence of writing rules out the existence of documentary codes of law such as are the enviable possessions of the Assyrians, the Babylonians and their imitators and successors in the art of codified law⁴².”

It is possibly this oral nature of African legal systems which confuses foreign legal writers into classifying all African legal systems as customary law systems.

II. The Customary Law Court System

In every town or village, there is a tribunal in which the Chief or headman presides. Higher or appeal tribunals also exist, which hear appeals from lower courts. In the case of Ghana, there is also a state council⁴³. All these tribunals were recognised by the Native Jurisdiction Ordinance 1883⁴⁴. Thus, what became known as the Customary Law Courts or Native Courts under British colonial administration derived their juridical power from statutes and not from indigenous authority⁴⁵. They differed in their constitution, powers and modes of execution of orders from the indigenous tribunals they came to replace and resembled the

⁴¹ Date-Bah argues that there has never been a decision in the Ghanaian courts to the effect that a person had lost his or her personal law. (1971) 5 R. G. L. p. 138.

⁴² Elias, p. 188.

⁴³ Danquah, J. B; *Akan Laws and Customs*, 1928, Chapter IV, p. 66.

⁴⁴ *ibid*, p. 66.

⁴⁵ Ollenu, N. A; “The Structure of African Judicial Authority and Problems of Evidence and Proof in Traditional Courts “ in *Ideas and Procedures in African Customary Law*, Ed. Gluckman, M; 1969, p. 110. Cited hereafter as Ollenu.

District Magistrate's Court in the English system⁴⁶. However, they retained some major characteristics of the indigenous African tribunal. For example, cases coming before them were principally cases involving customary law; second, practice, procedure and giving evidence were regulated by customary law⁴⁷. In giving evidence, for example, the holder of traditional office would speak in the first person of events which took place long before his time, for in African culture, an office holder identifies himself with his ancestors and predecessors⁴⁸. However, this does not mean that all forms of hearsay evidence are admissible. Gluckman reports on the Barotse that a witness was warned in the following words;

“What you heard with your ears, what you saw with your eyes, tell us. Hearing and seeing the quarrel are good. Do not tell us anything you have been told about the fight”⁴⁹.

The customary law court may also admit authentic documents which may appear to it as relevant, even though such documents would be inadmissible at a common law court⁵⁰.

At the lowest level of the court system is the arbitral court, or informal investigations held by the head and elders of a family or by a Chief *in camera*. These traditional tribunals continued to exist, despite the recognition of the higher courts by legislation. These tribunals came to be called courts of arbitration⁵¹. The proceedings at these courts are held almost exactly as before a formal tribunal⁵². There is a judicial investigation on the merits, except that it is held in an informal manner, and judgment is pronounced for one party or the other⁵³.

⁴⁶ *ibid*, p. 110.

⁴⁷ *ibid*, p. 110.

⁴⁸ Busia, K. A; *The Position of the Chief in the Modern Political System of Ashanti*, 1961, p. 73.

⁴⁹ Gluckman, M; *The Judicial Process Among the Barotse of Northern Rhodesia*, 1951, republished 1967, p. 51.

⁵⁰ Ollenu, p. 110.

⁵¹ *ibid*, p. 111.

⁵² Danquah, J. B; *Akan Laws and Customs*, 1928, p. 83.

⁵³ *ibid*, p. 86.

During the hearing, either party may swear the National Oath. The other party may (i) withdraw and have judgment pronounced against him. Or, (ii) he may proceed without swearing, in which case the proceedings continue unless the first party swears an oath to have the matter heard by a recognised tribunal; (iii) the second party may reply to the oath and the case then has to go to a Chief's tribunal⁵⁴. There are two types of arbitration proceedings;

- (i) arbitration properly so called which decides who is right and who is wrong, and
- (ii) reconciliation or negotiations for settlement.

If an award is made at the arbitration proceedings, it can only be enforced at a court of competent jurisdiction. The award is then recognised as "...definite evidence of liability before competent witnesses"⁵⁵. Although Danquah was writing about the Akans of Ghana, similar arbitration tribunals have been identified in Freetown⁵⁶ and in the Bechuanaland Protectorate⁵⁷.

The essence of arbitral proceedings is to decide who is right and who is wrong but there is also the family or domestic settlement, at which elders negotiate a compromise and persuade the parties to accept it, without going into the merits, as in boundary disputes but such an award is binding only if accepted by both parties. It is described by Sir Mark Wilson, C.J., as an attempt by a Chief and his elders or others, to negotiate a settlement agreeable to both parties so as to obviate violence and the growth of bad feeling in a community⁵⁸.

For an arbitral award to be binding, the Appeal Court of Ghana held in *Isifu v Donkor*⁵⁹ that;

- (i) the parties must have voluntarily submitted the dispute to the arbitrators to have

⁵⁴ *ibid*, pp. 85 – 86.

⁵⁵ *ibid*, p. 84.

⁵⁶ Banton, M; "Tribal Headmen in Freetown", *Journal of African Administration*, vi, 3, 1954, p. 10.

⁵⁷ Schapera, I; "The Ngwato of the Bechuanaland Protectorate", in *African Political Systems*, Ed. Fortes, M and Evans-Pritchard, E. E, 1940, pp. 63 – 64.

⁵⁸ *Ankrah & others v Debrah*, L.A. No. 93/53. 31 March 1954. Unreported. Cited in Ollenu, p. 116.

it decided informally but on its merits, and there must be evidence that the full implications were explained to, and agreed to, by the parties;

- (ii) they must have agreed in advance to accept the award;
- (iii) the award must be arrived at not arbitrarily but after hearing both parties in a judicial manner;
- (iv) practice and procedure for the time in the Native Court of the area must have been followed as nearly as possible; and
- (v) there should be publication of the award.

What appears to be important is that the award of a negotiated settlement must be accepted by both parties before it can be said to be binding on them. In Ghana, when the award is accepted by both parties, each of them must give *aseda* or a gift in cash or in kind to the tribunal to signify their acceptance⁶⁰.

An important feature of the African traditional legal system is that there is no distinction between the executive and the judiciary. The Chief and the elders, who hold political power in traditional society are also the judges who sit at the tribunals. This has the advantage of giving judgments and awards of the tribunals both political and judicial authority.

III. The Use of Legal Fiction in African Customary Law

Legal fiction is a tool employed in legal reasoning to alter how a legal rule operates. It assumes that something is true even though it may not be the case. The constructive trust in the common law is a good example of a legal fiction. Every legal system employs legal fiction to effect necessary adjustments to legal rules in order to do justice and to strengthen the legal system.

“Legal fiction is the mask that progress must wear to pass the faithful but blear-eyed

⁵⁹ S. Ct. Civil Appeal No. 78/62, 13 May 1963. Unreported.

⁶⁰ Ollenu, p. 118.

watchers of our ancient legal treasures”⁶¹.

African legal systems are no exception to this practice and legal fiction is used freely whenever the court finds itself in difficulties in adjusting a law to current needs. In the words of Driberg;

“But Africans are ingenious people and have devised another and easier way of getting out of an impasse. If any custom or law begins to feel oppressive, they do not care to abrogate it at once on account of religious sanction. But being masters of legal fiction, they devise a ceremony which in any particular case will absolve them from the operation of the old law. I may cite as an example a Thonga ceremony which breaks down the blood-tie and thus authorises a form of marriage legally incestuous. In course of time the ceremony becomes an important thing and takes the place of the obsolete law”⁶².

Elias cites several examples of legal fiction in various African societies to demonstrate how widespread the practice is. For example, the penalty for murder in most traditional African societies was death but to avoid revenge killing, the family or clan of the deceased would employ a total foreigner to carry out the execution, under the legal fiction that the guilty party was killed by an enemy during a battle⁶³. Revenge killing is socially disruptive and in hiring a foreigner to carry out the execution, the peace is preserved.

In civil matters, it is not unusual that a complainant would deliberately commit a public infraction, which would bring him before the elders or the chief. In the investigation into his offence, the complainant’s real grievance is revealed⁶⁴. To an outsider, such deliberations must seem lengthy with irrelevant and inadmissible evidence being adduced but the aim is

⁶¹ Cohen, Morris R; *Law and the Social Order*, 1933, p. 126.

⁶² Driberg, J.H; “The African Conception of Law” in *Journal of Comparative and International Law*. Nov. 1934, pp. 242 –3. Cited in Elias, T.O; *The Nature of African Customary Law*, 3rd Impression 1972, p. 177. Cited hereafter as Elias.

⁶³ Elias, p. 178.

⁶⁴ Rattray, R. S; *Ashanti Law and Constitution*, 1929, p. 288.

to always do justice.

Among the nobility of the Baganda in Uganda, the fiction was employed that a male adulterer was a *muusi* or a murderer. The one-time Attorney-General of Uganda, Hone, reports it as follows;

“We may pause for a moment to state that, apart from the fact that among the better classes of the Baganda, the chastity of married women was carefully guarded, the justification for the exaction of the extreme penalty in such cases of adultery is authoritatively stated to be based on a legal fiction, the very existence of which is, to say the least, remarkable”⁶⁵.

The reason for referring to the adulterer as a *muusi* was that a member of the upper classes would always go armed with a spear to visit his married mistress and would not hesitate to use the weapon if he was discovered. He was therefore regarded as a potential murderer and if found guilty of adultery, was executed for murder⁶⁶. During the colonial period, the repugnancy rule outlawed such a punishment and heavy fines were imposed instead⁶⁷.

In the administration of justice some African societies employ legal fiction to secure the immunity and impartiality of judges. The Baganda usually appoint a chief to act as a chief judge in important cases coming in from any village under his jurisdiction. The heads of all families signify their acceptance of his judicial authority by ceremonially cutting down some of the judge's banana trees in the presence of others⁶⁸. The entire town in which the chief lives, becomes the offended town and must never be attacked. If any of the judge's future decisions should go against the fictional offenders they could not attack him or the village⁶⁹. In this way the stability of society is maintained and the security of tenure of the judge is guaranteed.

⁶⁵ Hone, H. R; “The Native of Uganda and the Criminal Law” in *The Uganda Journal*, Vol. VI, No.1 July 1938, p. 5.

⁶⁶ Elias, p.179.

⁶⁷ *ibid*, p.179.

⁶⁸ *ibid*, p.180.

The legal fiction is based on the notion that the fictional offenders had first offended the judge by cutting down his banana trees and since it is accepted principle that a second offence could only be entertained after the first had been heard, the complainant's case against the judge's verdict cannot be heard until the first offence against the judge had been resolved⁷⁰.

Among the Sesuto of Botswana, "all children born to a man's wife, whether begotten by him or not, and even if begotten after death, are regarded as his legitimate issue"⁷¹. It could happen that the pregnant woman was never properly married to the deceased. In that case, the woman is declared "married to the grave" of her 'deceased husband' and by custom, gets married to the younger brother in the name of the deceased. "By a legal fiction, her children are regarded as the deceased's children and the eldest son should succeed him"⁷².

In modern times, a brother no longer "inherits" his deceased brother's children, generally the courts would award the children to the mother's family⁷³. Ashton reports that the practice has almost died out. It was once a social and economic insurance for aged widows but is now seen by the younger generation as immoral⁷⁴.

The extensive use of legal fiction in African legal systems is due probably to slower development of legislation. As society develops from rural to urban lifestyle, the familiar legal rules are not always able to deal adequately with new problems which arise. Legal fiction is quick to develop on case by case basis as a means of extending or modifying strict rules of law in the light of changing society. One major usefulness of legal fiction is that it conceals the fact that a rule of law has been changed or modified. That is a useful contribution to the stability of society.

⁶⁹ *ibid*, at p.180.

⁷⁰ *ibid*, p.180.

⁷¹ Ashton, H; *The Basuto*, 1952, p. 194.

⁷² *ibid*, p.195.

⁷³ *ibid*, p.182.

IV. Sources of Conflict in African Legal Systems

(i) The Political Organisation of African Societies.

The earliest mention of the political organisation of African societies is that of Al-Yaqubi, an Arab geographer and traveller, who visited the kingdoms of Ghana, Gao and Kanem in 872 AD⁷⁵. He observed that these kingdoms had other kings under their authority. Al-Yaqubi had unwittingly discovered the basic structure of political organisation in West Africa. Large empires and kingdoms are in fact, superstructures imposed over smaller kingdoms and chiefdoms. Elias has classified political organisation in West Africa into three main types⁷⁶.

Group A. Consists of highly centralised authority in which loyalty is owed to one supreme ruler or King-in-Council. Elias further divides this group into two sub-groups:-

(a) strong centralised kingdoms, such as the Ashanti, Yoruba or the Baganda in Uganda. Although these are centralised, a good deal of power is devolved to the various territorial units which owe common allegiance to the king;

(b) a loose federation of kingdoms, united under an overlord, mainly for administrative purposes. The majority of West African societies fall into this group.

Group B. Here the societies generally have neither monarchies, centralised authority nor organised judiciary but recognise certain elders as traditionally qualified to participate in the settlement of disputes. The social units are territorially independent of each other.

⁷⁴ Ashton, H; *The Basuto*, 1952, p.82.

⁷⁵ Al-Yaqubi; *Kitab al-Tarikh*, Ed. by Houtsma, 1863-6, pp. 219-20. Cited in the *Cambridge History of Africa*, Vol. 2. 500 - 1050 AD, p.667. The principal sources of the early history of West Africa are from Arab geographers and historians until about the fifteenth century. Among the Arab authors whose accounts show knowledge of the northern parts of West Africa are al-Khwarizmi, al-Fazari, al-Yaqubi, Ibn al-faqih and al-Bakri; *Bibliographical Essays to the Cambridge History of Africa*, Vol. 2, p. 716.

⁷⁶ Elias, p. 11.

Group C. Comprises of societies organised on general principles of Islam, such as Northern Nigeria, Northern Ghana, most of The Gambia, Senegal, Guinea and all the societies of the Sahel region. These are usually strong centralised semi-feudal organisations, except where the hold of Islam is weak, such as Northern Ghana. However, this group is closer to Group A than to North African theocracies, except that religion plays a more important role in their legal systems than in the other groups.

In Group A societies, a chief is the territorial head of administration and of the judiciary. He is the final authority within the territory over which he is chief. Islamic territories in Group C also have the same organisation.

In Group B, on the other hand, each territorial unit is independent of the other and no single authority has overall jurisdiction. Power is confined to each territory.

The common feature of Group A societies in West Africa is the devolution of power to the regions and districts⁷⁷. To avoid tyranny and absolutism by the king, an array of mechanisms have been evolved to limit his power. Institutions such as the King's Council of Chiefs, the Queen Mother's Court and powerful secret societies in which the king is *primus inter pares*⁷⁸, have seen to it that the king does not become an absolute ruler. If he abuses power, he could be deposed (destooled) or the subordinate chiefs could secede from the federation. Elias reports that among the Yoruba of Nigeria, the king could be required to commit suicide by swallowing poison⁷⁹.

The devolution of power to the regions and the federal system have made conflict between the laws of the various legal systems inevitable.

⁷⁶ Elias, p. 11.

⁷⁷ Rattray; *Ashanti Law and Constitution*, 1929, p. 81.

⁷⁸ Discussed in Butt-Thompson, F. W; *West African Secret Societies*, cited in Elias note 16.

⁷⁹ Elias, cited note 16.

(ii) Conflict between Islamic Law and Local Customary Law.

(a) Historical background of Islam in West Africa.

Islam was first introduced into West Africa by Berber and Arab traders but by the end of the ninth century, Al-Yaqubi was still able to say that the King of Ghust (Awdaghust), "did not follow any religious practices nor possess any revealed law⁸⁰". In other words, the king was a non-believer. Gradually, however, a few leaders in the Sahara region became islamised although their Islam remained diluted with their own practices and laws⁸¹.

The turning point seems to have arrived when the first disciples of Malik b. Anas arrived in Ifriqiya (the Maghrib) and established the *fuqaha*, or the Maliki school of law. The Malikites won the sympathy of the common people who admired their strict adherence to the holy Koran and the *Sunna*⁸². In the Sahara region of West Africa, the centre of Islamic learning came to be established at Kairouan from where the Malikites propagated the study of Islamic jurisprudence (*fiqh*) and though they were ascetics, they did not withdraw entirely from the world. They became the defenders of the common people's rights and challenged the rulers over the people's rights⁸³. By the tenth century Kairouan had become such an important centre for the study of Islamic law that almost all important Islamic lawyers of the Maghrib studied there at some point⁸⁴.

However, the major achievement of the Malikites was the conversion to Islam of the first major Empire of West Africa, the Ghana Empire⁸⁵. In 1076, the Almoravids conquered the Ghana Empire and converted many to Islam. By the beginning of the twelfth century, Ghana

⁸⁰ Al-Yaqubi; *Buldan*, p. 300. Cited in Cambridge History of Africa Vol.2, 500 BC - AD 1050, p. 655. Most of the discussion in this section is based on material in Volume 2, Cambridge History of Africa.

⁸¹ *ibid.*, at p. 655.

⁸² *ibid.*, at p. 656.

⁸³ *ibid.*, at p. 657.

⁸⁴ *ibid.*, at p. 657.

⁸⁵ Ca AD 300 - 1070.

was able to expel the Almoravid invaders and to reassert her independence but the Moslem influence remained⁸⁶.

The Islam which the West Africans came to accept was rather rudimentary. The King of Malal, a Malinke kingdom, was converted to Islam only because a Moslem appeared in his kingdom and prayed for rain during a drought which had lasted several years. It rained and he agreed to be converted but "...while the common people remained polytheists⁸⁷". The islamisation of the leadership became the pattern in West Africa. The leadership needed the literary skills of the Moslem scholars to keep records, write letters and to communicate with foreigners and, to please them, the king would convert to Islam. But the king had to lead a non-Moslem population and in mobilising national resources, he had to turn to the traditional religions and law which were relevant to his people rather than the universalistic appeal of Islam;

"That the king of Malal was taught only those religious obligations which no one might be excused from knowing might indicate the superficial islamization of the chief, whose ties with the traditional religion were not totally severed"⁸⁸.

By the fourteenth century, the Mali Empire, which had replaced Ghana, was at its height and the reigns of the Emperors Askiya Mansa Munsa and his brother Sulayman Mansa are hailed in the Arab annals as the age of Islam in West Africa. Mansa Munsa is described as "...a pious and righteous man" who... "made his empire a part of the land of Islam, built mosques...and instituted the public prayer on Friday.... He attracted Maliki scholars... and was devoted (himself), to Islamic studies"⁸⁹. Nevertheless, Mali only had an appearance of a

⁸⁶ Cambridge History of Africa, Vol. 3, p. 349.

⁸⁷ Al-Bakri; *Kitab al-masalik wa'l-mamalik*, Translated and edited by M.G. de Slave (Algiers 1911), p. 178. Also cited in the Cambridge History of Africa, Vol. 2, p. 672. Al-Bakri is credited with the most detailed and accurate accounts of these parts of West Africa. He was the first from the Western Moslem world (Spain and the Maghrib) to have had access to information about the Sahara and West Africa. Al-Bakri's accounts are regarded as indispensable for the study of the period of the 1050s. He wrote extensively on the West African states of Takrur, Ghana and Gao.

⁸⁸ Cambridge of Africa, Vol. 2, p. 672.

⁸⁹ Cambridge History of Africa, Volume 3, c.500 B.C – AD 1050, p. 390.

Moslem State, a thin layer beneath which traditional beliefs and law prevailed. Ibn Battuta reported that he was present at two Islamic festivals which were turned into non-Moslem national feasts when the King arrived⁹⁰. Thus, although the people learnt the Koran by heart, this was merely an external trapping. The only link the people had with Islam was their membership of an Islamised Empire. The *Sharia* (Islamic Law), was almost totally ignored, especially in family law and sexual behaviour. The King and the nobility combined Islam with traditional practices and only the 'true Moslems', Arab traders and clerics, remained fully committed to Islam.

This approach to Islam continued into the Songhai Empire, which succeeded Mali. Moslem traders, clerics and Arab travellers were treated with respect because of the powerful magic which their religion was thought to possess but even more so because they were literate and could communicate with foreigners from North Africa and Europe and their commerce contributed to the economy⁹¹. For these reasons, the Emperor and the lesser kings allowed themselves to be Islamised. The attitude of the Emperors to Islam is demonstrated by the behaviour of the Songhai Emperor Sonni Ali, in the seventeenth century. Sonni Ali's mother was non-Islamic. He observed the fast of Ramadan and gave contributions to the mosque "... but at the same time, he used to worship idols, sought the help of sorcerers and sacrificed to trees and stones"⁹². Although he observed the Moslem prayer, he did not observe the time and would often postpone a prayer until night or the next day;

"...then instead of performing the prescribed ritual of prayer, he only indicated it by slight inclinations, and merely repeated the name of the prayer, instead of reciting the *fatiha* and other *sunas*, which he did not care to learn"⁹³.

Sonni Ali's was not an isolated case. Most of the ancient Emperors and many local leaders today practice a dual role. They allow themselves to become islamised but only for

⁹⁰ *ibid*, at p. 390.

⁹¹ *ibid*, at p. 423.

⁹² *ibid*, at p. 424.

⁹³ Cambridge History of Africa, Vol. 3, p. 424.

functional reasons, for their legitimacy is derived from local religion and law⁹⁴. Most probably it is this mixture of Islam and traditional religions which gave the British colonial administration the view that Islamic and customary law were much the same thing.

By the eighteenth century, Islam had arrived on the fringes of the forests of West Africa but again, its effect was not uniform. While Islam remained the exclusive religion of North Africa, it only had marginal effect in West Africa. The literary usefulness of Moslems continued to be exploited and this practice continued south. Thus, Gonja chiefs (in modern Ghana), absorbed islamic influence but refused to be converted to Islam or practice the *Sharia*⁹⁵. In Borgu, northern Dahomey (now Benin), the chiefs were so reluctant to accept Islam that they agreed to satisfy their Moslem clerics by reciting Islamic prayers twice a year⁹⁶.

Thus, by the eighteenth century, Islam had become integrated into the socio-political systems of the savannah states⁹⁷ but the lukewarm attitude of the nobility to Islam displeased devout Moslems and in the eighteenth and nineteenth centuries, a series of *jihads* were unleashed on the northern belt of West African kingdoms in an attempt to compel them to accept and practice Islamic law and religion. The *jihads* however, did not reach the southern savannah states⁹⁸.

The *Jihads* came to be lead by the Fulanis, who originated from the Halpular Valley in Senegal and for many centuries, had been nomads. Most of them adopted the Islamic religion and became sedentary. In the fifteenth century, some of them began a slow migration from the Senegambia towards the East, into Hausaland (now Northern Nigeria), where they settled in small communities among non-Moslems⁹⁹. It was among the Fulani left behind in the Senegambia that the *Jihad* began in 1680. A certain Malik Si declared a

⁹⁴ *ibid*, at p. 424.

⁹⁵ Cambridge History of Africa, Vol. 4, p.194.

⁹⁶ *ibid*, at p.196. Savannah states border, roughly the southern forests and the beginning hotter desert climate.

⁹⁷ *ibid*, at p.197.

⁹⁸ *ibid*, at p.199.

⁹⁹ Cambridge History of Africa, Vol. 5, pp. 129-30.

followed in 1725 by Alfa Ba who declared a *Jihad* against the non-Moslem Fulani of Futa Jalon and founded a Moslem dynasty which survived until the nineteenth century, when it was destroyed by the French¹⁰¹. There is no indication that Islamic law was strictly enforced, especially upon the non-Fulani elements in the conquered areas¹⁰².

The most prominent *jihad* leader however, was Shehu Usman Dan Fodio, who was born near Sokoto (now Northern Nigeria), in 1754, of a scholarly Fulani family which had settled there. Dan Fodio was a strict believer in the Maliki rites and slowly came to believe that he was the *Mujaddid*, a 'Renewer of the Faith', whom God sends once every hundred years to reform Islam and prepare the way for the Mahdi¹⁰³.

The main result of the jihad was that the Moslem religion and law came to be firmly established in Sokoto and the *Sharia* was imposed on the towns and larger villages but in the countryside, the pre-Islamic ways persisted. Thus, pre-Islamic law applied, and still does, in most parts of the country, while the *Sharia* applies in the towns¹⁰⁴.

The reasons why the Fulani jihadists refused to follow up their victories and impose strict Islamic law throughout the country appears to lie in the motives which may have prompted the jihad in the first place. The Fulani had been nomadic people, most of whom had decided to become sedentary only after becoming Moslems¹⁰⁵. However, the land tenure system in West Africa is such that an individual has free access to land use only if he or she belongs to the community which owns it. Elias describes the pattern as follows:

In Nigeria as in practically all British West African colonies, ownership of land in the accepted English sense is unknown. Land is held in community ownership, and not, as a rule by the individual as such¹⁰⁶.

¹⁰¹ *ibid*, at p.130.

¹⁰² *ibid*, at p.130.

¹⁰³ *ibid*, at p.134.

¹⁰⁴ *ibid*, at p. 149.

¹⁰⁵ *ibid*, at p. 138.

This form of ownership of land is common to most of West Africa. Thus, a nomadic Fulani leader and his followers would enjoy the hospitality of the local ruler and settle on the community land but without being able to acquire title to it. In Hausaland, the pattern was wide-spread and the local leader usually imposed restrictions on the Fulani settlers regarding grazing concessions, limitations on the use of water, penalties for grazing across crops and so on¹⁰⁷. In time, the Fulani clan leaders came to resent the escalating restrictions and when Dan Fodio rose to overthrow their Hausa hosts, most of the settlers joined him.

Another reason for the success of the jihad in Hausaland was slavery. Slave raiding had become part of the Hausa economy and while Moslems would, as a rule, not enslave another Moslem (it being forbidden by the *Sharia*), the Hausa would enslave anyone they could capture¹⁰⁸. This may have united the Moslems against Hausa rulers and most likely, encouraged non-Moslems to convert so as to obtain protection. It is also believed that the jihadists attracted the support of escaped slaves and of the underprivileged¹⁰⁹.

The jihads were thus not only the result of asceticism but also of complex social and economic conditions. After the jihadists had succeeded in obtaining their goals, much of West Africa returned to the *status quo ante*, mixing Islam with traditional ways¹¹⁰. The notable exception was the Sokoto jihad, led by Dan Fodio but even here Islam did not extend far into the countryside. Islamic law has come to be seen in West Africa as a variety of the local legal systems and not necessarily as a separate system with separate rules as is the case in the Eastern African countries of Somalia, Kenya and Zanzibar¹¹¹.

(b) Historical Background of Islamic Law in East Africa

The mode of arrival of the Islamic religion in East Africa was different from that of West

¹⁰⁶ Elias, T. O; *Nigerian Land Law and Custom*, 2nd Ed 1953, p. 38.

¹⁰⁷ Cambridge History of Africa, Vol. 5, p.138.

¹⁰⁸ *ibid*, at p. 138.

¹⁰⁹ *ibid*, at p.138.

¹¹⁰ *ibid*, at p.149.

¹¹¹ Anderson, J. N; "Relationship between Islamic and Customary Law in Africa", *Journal of African Administration*, Vol.12, 1960, p. 228.

The mode of arrival of the Islamic religion in East Africa was different from that of West Africa. While Islam was brought to West Africa by missionaries and traders, religious persecution figures as the main reason for migrants leaving the Persian Gulf to settle in East Africa¹¹². More recent arrivals were also attracted by trade and the prospects of well-watered lands waiting to be inhabited¹¹³.

The earliest information on East Africa comes from the Arabs writing in the ninth and tenth centuries¹¹⁴. According to Al-Masudi¹¹⁵, the people of the area kept cattle and were of Ethiopian (Cushitic) stock. The Arabs called the people of East Africa the Sanj, who had kings who were elected and troops under their command¹¹⁶.

According to Ibn al-Mujawir, the earliest Moslem settlement was from the Yemen when the Bantu Majid people, East Africans who had settled there, were expelled. A section of these people settled in what is now Mogadishu in 1159¹¹⁷. They were joined later by merchants from Abyan and Haram in the Gulf region. Mogadishu was inhabited solely by these foreigners who were divided into clans, each with its own Shaykh or leader. A visitor had to stay with one of the elders of the clans, who would sponsor him¹¹⁸. Islamic religion and trade then spread south to the islands of Pemba and Zanzibar¹¹⁹.

The major migration however started from Oman to the land of the Sanj. The brothers Said and Sulayman b. Abbad were defeated by the Umayyad Caliphate forces and they emigrated with their families and followers to the area now known as Mombasa¹²⁰, Kenya. In the

¹¹² Cambridge History of Africa, Vol. 3, c.1050 – c 1600, p.199.

¹¹³ *ibid*, at p.199.

¹¹⁴ This historical narrative is based on the Cambridge History of Africa, Vol. 3, pp. 188 – 201, at p. 188.

¹¹⁵ Al-Masudi; *Muruj al-dhahab*. French translation, *Les prairies d'or*, Edited and translated by Pellat, C, 1962 –71, p. 32.

¹¹⁶ Cambridge History of Africa, Vol. 3, p. 188.

¹¹⁷ *ibid*, at p. 196.

¹¹⁸ *ibid*, at p. 196.

¹¹⁹ *ibid*, at p. 197.

¹²⁰ *ibid*, at p. 198.

Twelfth century, more foreigners emigrated from various parts of the Persian Gulf and settled in Mogadishu and other parts of the East African coast. By the Fourteenth Century, several towns had been established on the coast, all of them inhabited by Moslems¹²¹. The settlers were very different from the people in the hinterland who were non-Moslem. Between the ruler of each city state on the coast and the chiefs of the hinterland, there were agreements as to rights and obligations. There were no attempts by the coastal people to penetrate the interior or to convert its inhabitants to Islam¹²².

The inhabitants of the coastal cities fell into three groups. The ruling class, usually of mixed Arab and African ancestry (the "dark moors" as the Portuguese called them), who were the major landowners, merchants and religious leaders. On the second level were the pure-blooded Africans, probably captives from the mainland who were in a state of slavery. They cultivated the fields and carried out other menial tasks¹²³. Distinct from these two classes were the transient or recently settled Arabs and Persians, not yet assimilated into the society¹²⁴.

There appears to have been a form of association between the immigrant Arabs and the Sanj in the area now known as southern Somaliland. Each Arab trader or group of traders had a Sanj who acted as his patron (Sahib) and who, with his people, would defend the Arab if he had a dispute with another Sanj¹²⁵. The Arabs, on the other hand, provided military protection. If an Arab absconded with the goods of a Sanj, the Sanj was entitled to take the goods of any Arab until the debt was settled¹²⁶.

Relations between the settlers and the mainland people must have been cordial as only one town on the coast, Gedi, was ever defended by walls before the Sixteenth Century¹²⁷. The religion of the coastal towns was exclusively Islam of the Sunni sect and of the Shafii

¹²¹ *ibid*, at p. 207.

¹²² *ibid*, at p. 208.

¹²³ *ibid*, at p. 209.

¹²⁴ *ibid*, at p. 209.

¹²⁵ *ibid*, at p. 209.

¹²⁶ *ibid*, at p. 210.

¹²⁷ *ibid*, at p. 210.

school. The Africans of the interior were not converted to Islam and there was no significant penetration of the interior except in the Zambezi region¹²⁸.

The British colonial administration in East Africa faced a situation which was quite different from their experience in West Africa. In West Africa, Islamic law was referred to simply as "native law and custom" possibly because the Islamic law found in West Africa was not alien to traditional legal systems¹²⁹. In East Africa, on the other hand, there were immigrant Moslem communities and indigenous Moslems whose attitudes to Islam may not necessarily coincide with those of the immigrants. It was therefore more difficult to enforce Islamic law as "native law and custom"¹³⁰. Thus, the Kenya Colony Order in Council of 1921 provided that;

"In all cases, civil and criminal, to which natives are parties, every court (a) shall be guided by native law, so far as it is applicable and is not repugnant to justice and morality, or inconsistent with any Order in Council or Ordinance, or any regulation or rule made under any Order in Council or Ordinance and (b) shall decide all such cases according to substantial justice, without excessive regard to technicalities of procedure and without undue delay¹³¹".

In Article 3, the Order in Council defines "native" as "indigenous inhabitant of Africa or Arabia", thus taking into consideration the needs of the immigrant communities.

The coastal strip, referred to as the Protectorate of Kenya, remained the dominion of the Sultan of Zanzibar until Kenyan independence¹³² and yet, the Kenya Protectorate Order in Council, 1920, merely provided that;

"The Courts now or hereafter established in the Colony shall have in respect of

¹²⁸ *ibid*, at p. 211.

¹²⁹ Anderson, J. N; *Islamic Law in Africa*, 1970, p. 3. Hereafter cited as, Anderson.

¹³⁰ Anderson, p. 3.

¹³¹ Article 12.

¹³² Anderson, p. 81.

matters occurring within the Protectorate, so far as such matters are within the jurisdiction of His Majesty the same jurisdiction civil and criminal, original and appellate as ...

occurring in the Colony¹³³.

No reference was made to Islamic Law but the concession granted to the Imperial British East Africa Company on 9 October 1888, provided that the Qadis, or Islamic Court judges would be appointed by His Highness the Sultan¹³⁴. Likewise in Tanganyika, no special provisions were made for the enforcement of Islamic law although Islamic courts existed and were enforcing Islamic law¹³⁵.

The Uganda Order in Council 1902 also provided for the application of native law but made no reference to Islamic law¹³⁶. However, the Marriage Ordinance and the Divorce of Muhammadans Ordinance, 1906¹³⁷ made important provisions concerning Moslem marriages. It provided that the Marriage Ordinance and the Marriage of Africans Ordinance shall not apply to marriages between persons both of whom professed the Moslem religion and neither of whom is a party to an existing marriage under or declared valid by the said Ordinance with any person other than a Moslem¹³⁸. It also provided that every marriage "...previously celebrated between Moslems shall be deemed to have been a legal and valid marriage"¹³⁹. The legislation went on to recognise future relationships by providing that;

"All marriages between persons professing the Muhammadan religion, and all divorces from such marriages celebrated or given according to the rites and observances of the Muhammadan religion customary and usual among the tribe or sect in which the marriage or divorce takes place, shall be valid and registered as

¹³³ Article XII.

¹³⁴ Hertslet, E; *Map of Africa by Treaty*, 1896, p. 353.

¹³⁵ Anderson, p.122.

¹³⁶ *ibid.*, at p.148.

¹³⁷ Cap. 110.

¹³⁸ Section 2. See Anderson, p. 148.

¹³⁹ Anderson, p. 148.

herein provided¹⁴⁰.”

The Ordinance went into considerable detail which included the provision that in case of a divorce between persons of the Shia sect, there must be two witnesses that a divorce, known as *khul*, is distinguished from other forms, which require registration of the divorce by both husband and wife¹⁴¹.

The Ordinance provided for "a fine or imprisonment if they [the parties] failed to register their marriages or divorces"¹⁴². Nevertheless, it stated that:

“Nothing in this Ordinance shall be construed to (a) render invalid, merely by reason of its not having been registered, any Muhammadan marriage or divorce which would otherwise be valid; (b) render valid, by reason of its having been registered, any such marriage or divorce which would otherwise be invalid¹⁴³.”

Detailed as the Ordinance was, it left out succession but covered marriage and divorce and catered fully for other family relationships by providing in Section 3 for the recognition of relationships “according to the rights and observances of the Muhammadan religion and usual rites among the tribe or sect”. The use of the expressions “...and usual rites among the tribe or sect” appears to suggest that the various Islamic sects and customary law systems were included¹⁴⁴.

The Marriage Ordinance, 1902¹⁴⁵, however remained in force and according to Anderson¹⁴⁶, would have the following consequences:

(1) "A Muslim man who marries a Christian woman under the Marriage Ordinance may

¹⁴⁰ Section 3.

¹⁴¹ Section 9.

¹⁴² Section 18. Anderson, p. 148.

¹⁴³ Section 17.

¹⁴⁴ Anderson, p. 149.

¹⁴⁵ Cap.109.

¹⁴⁶ Anderson, p. 149.

neither contract another legal marriage nor divorce his wife except under the terms of the Divorce Ordinance - although he would be free to marry up to three more wives or divorce his wife for any or no reason under Islamic law".

First, it is not clear what Anderson means by "...contract another legal marriage...." If a man who marries under the Ordinance converts to Islam and marries a second wife, as Islamic law permits him to, then that second or subsequent Moslem marriages are legal. Second, why is emphasis placed on the wife being Christian? Suppose the wife were subject to some regime of customary law or Jewish law, would she lose the protection of the Ordinance? Christianity, as a religion, offers no legal protection enforceable at law, thus, a Christian wife is not any better protected in law than wives belonging to other religions. What appears to be the case is that Anderson is attempting to create a hierarchy of legal norms, placing the Ordinance at the apex.

- (2) "A Muslim girl who has reached the age of twenty-one may marry a non-Muslim under the Marriage Ordinance, and so may a girl of under that age if her father or (if he be dead, insane or absent from the Protectorate) her mother, etc., gives consent in writing - although such a union is utterly precluded under Muhammadan law".

Anderson admits that in Islamic law, the mother's consent is void, as only the father or the guardian may give such consent. It is an established rule in English law that for a marriage to be recognised, each party must have capacity to marry¹⁴⁷. That capacity is governed by the law of each party's domicile or personal law, where applicable. The capacity to marry, for an under-aged Moslem girl, is provided by her personal law, Islamic law, and if that law says that only the father or guardian may give consent for the under-aged girl to marry, then the mother's consent must be void. Anderson himself states that in the Ordinance "provision is made for the marriage of minor boys and girls *by their guardians*"¹⁴⁸.

¹⁴⁷ Cheshire and North; *Private International Law*, 13th Edition 1999, p. 721.

¹⁴⁸ Anderson, p. 148. Emphasis mine.

- (3) "A non-Muslim man married under either the Marriage Ordinance or the Marriage of Africans Ordinance, 1903¹⁴⁹, who subsequently embraced Islam would not thereby be in a position to divorce his wife or remarry (or, indeed to regard his marriage as automatically dissolved) except as provided in the Divorce Ordinance, 1904¹⁵⁰, regardless of the position in Islamic law".

It is difficult to accept Anderson's position. Conversion to Islam, endows the husband with a new personal law which becomes immediately applicable. It is suggested that the husband is free to divorce his wife under Islamic law. Although *Jatoi v Jatoi*¹⁵¹ is a decision by the Supreme Court of Pakistan, it is of persuasive value. In that case, the court held that although a Moslem man married a non-Moslem woman according English law, he was free to divorce her according to Islamic law. There is no rule in law which suggests that the *lex loci celebrationis* must also be the law of the divorce.

- (4) "Similarly, a non-Muslim woman married under either of these two Ordinances who subsequently embraced Islam would still be bound by her marriage, although this is regarded as automatically dissolved, if the husband be a non-Muslim and refuses to accept Islam, under the Sharia".

By converting to Islam, the wife acquires a new personal law by which her marriage to the non-Moslem is automatically dissolved if the husband refuses to convert to Islam. It is difficult to see how the Ordinance could compel the woman to remain married although her personal law, which is the applicable law, has pronounced the marriage dissolved.

During the British colonial administration, the Moslem communities in East Africa came to comprise of Indians, Baluchis, Persians and Arabs from various parts of the Middle East¹⁵². As far as enforcement of Islamic law was concerned, there appeared to be little difficulty, especially in family matters. In Kenya, Baluchis, Arabs and Somalis were subject to the

¹⁴⁹ Cap. 111.

¹⁵⁰ 1904, Cap. 112.

¹⁵¹ (1967) PLD, SC.

¹⁵² Anderson, p. 322.

jurisdiction of Qadis. In Tanganyika they would submit to the jurisdiction of the Liwalis¹⁵³, while in Somalia, they would submit to the Qadis' jurisdiction¹⁵⁴.

(c) Application of Islamic Law

Generally, in conflicts between Islamic and customary law, it is necessary to distinguish those countries where Islamic law was regarded as a variety of native law and custom from those where it was treated as a distinct legal system. In the former case, conflict situations are left to the native courts, "...such as the Native Tribunal of the Gambia"¹⁵⁵. According to Anderson,

"...it is here that the particular genius of native courts makes itself felt, and they are able to make special concessions, at times to Muslim litigants in a way that British courts could scarcely attempt to emulate"¹⁵⁶.

The aim of the native court is not to enforce rigid law but

"...to reach an equitable solution to the individual case, a solution based on legal principles, but with a flexibility of adjustment designed to preserve the social equilibrium and satisfy both the parties and the public"¹⁵⁷.

In cases where Islamic law is treated as a separate system, the conflict is avoided by creating a separate court for Moslems¹⁵⁸. In Northern Nigeria, for example, all matters, civil and criminal, except the area of land law where customary law still ruled, and where all parties were Moslems, came before the *Alkali's* court of the Emirs¹⁵⁹. The British colonial policy of

¹⁵³ Swahili for *Qadi*.

¹⁵⁴ *ibid*, at p. 322.

¹⁵⁵ Anderson; "Colonial Law in Tropical Africa: the Conflict between English, Islamic and Customary Law"; *35 Indian Law Journal*, 1959 – 60, p. 440.

¹⁵⁶ *ibid*, at p. 440.

¹⁵⁷ *ibid*, at p. 440.

¹⁵⁸ *ibid*, at p. 440.

¹⁵⁹ Coulson, N. J; *Islamic Surveys; A History of Islamic Law*, 1964, p.157. Cited

non-interference in religious matters and the recognition of native law and custom was preserved. However, the repugnancy clause, “repugnant to natural justice and humanity” was available to the Government to limit or prevent certain types of punishments such as amputation of the hand for theft and stoning for adultery¹⁶⁰.

Some Islamic punishments remained though, such as flogging for fornication, wine-drinking and slanderous allegations of unchastity. However, the manner in which the punishment was imposed indicated that it was meant to inflict public shame and religious penance and not pain;

“for the one who administers the lashes must hold the whip between his fingers, must keep a stone or similar object under the arm he is using and must not raise his wrist above the level of his elbow¹⁶¹.”

While Coulson believes that this is the traditional way of imposing the punishment¹⁶², it is highly probable that the Islamic courts were being careful to avoid flogging forbidden under the repugnancy rule. The manner in which flogging, and other Islamic punishments, are imposed in modern Northern Nigeria seems to confirm this view¹⁶³.

hereafter as, Coulson.

¹⁶⁰ *ibid*, at p.157.

¹⁶¹ *ibid*, at p.158.

¹⁶² *ibid*, at p.157.

¹⁶³ This view is gathered largely from the news media. In September 2002, the Sharia court of Katsina State, condemned a woman, Amina Lawal to death by stoning for having had a child outside marriage. See *West Africa Magazine*, 2 – 8 September 2002, Issue No. 4341, p.20. A *Miss World* contest scheduled to be held in Nigeria in November 2002 had to be cancelled due to rioting by Islamic radicals who considered such a contest unislamic. See *Political Tensions and Religious Riots*, in *West Africa Magazine*, 9 – 12 December 2002, Issue No. 4355, pp. 10 – 11. Between 2001 and 2002, the Sharia courts of Northern Nigeria have handed down 36 sentences according to Sharia Law, including the following; 2 convictions of 126 lashes of the cane each for carrying women on motorcycles; one conviction of 80 lashes for stealing 3 packets of cigarettes; 3 convictions of 180 lashes each for fornication; six convictions of amputation for theft and three convictions of death by stoning for adultery. See *The Dialectics of the Sharia Imbroglia in Nigeria*, pp 48 - 49, Monograph by Dr John A. Yakubu, Demyaxs Law Books, Nigeria, Monograph Series 4. Copy on file.

The jurisdiction of the Islamic courts, especially in criminal matters, was not total, for there were cases where the Nigerian Criminal Code prevailed and the matter would come before a British-type court. This was usually the case in homicide cases where it had to be determined whether the Islamic court had jurisdiction under the Native Courts Ordinance¹⁶⁴. The decision as to which court had jurisdiction was crucial to the type of punishment imposed. In Islamic law, deliberate killing or murder as well all other cases of unintentional killing carried the death penalty if the relatives of the deceased demanded it¹⁶⁵. Defences to homicide in Islamic law are not available and even provocation, which in the common law, would only amount to manslaughter, carries the death penalty¹⁶⁶. To determine whether the Islamic court or the common law courts had jurisdiction, it had be established whether (a) the accused was subject to the jurisdiction of the native courts, (b) whether the offence was committed within the boundaries of the Emirate in which the Emir's court had jurisdiction in criminal cases, (c) whether the case had been investigated by the Nigeria Police or by the Native Authority Police, and (d) whether the Resident or other Officer saw it fit to transfer the case from the native court to the common law court¹⁶⁷.

This dual jurisdiction was to be found in Native Courts Law 1956¹⁶⁸ which provided as follows;

“Subject to the provisions of this Law but notwithstanding anything contained in the Criminal Code Ordinance, where any person is charged with an offence against native law and custom, a native court may try the case in accordance with native law and custom even though the act or omission constituting the offence may also constitute an offence under the provisions of the Criminal Code or any other enactment.

¹⁶⁴ *ibid*, at p.158.

¹⁶⁵ *ibid*, at p.158.

¹⁶⁶ *ibid*, at p.158.

¹⁶⁷ Anderson, J, N; “Conflict of Laws in Northern Nigeria”, *J. A. L.*, No. 2, 1957, p. 87.

¹⁶⁸ Cap. 78.

Provided that where an act or omission constituting an offence against native law and custom also constitutes an offence under the provisions of the Criminal Code or of any other enactment, a native court shall not impose a punishment in excess of the maximum punishment permitted by the Criminal Code or such other enactment.”

This unsatisfactory situation led to a conflict in judicial opinion as to whether the Supreme Court could, on appeal, interfere with a death penalty properly imposed by an Islamic court for homicide which only carries manslaughter under the Criminal Code. This conflict in judicial opinion continued until 1957 when it was decided that native courts must not impose a sentence which was in excess of the maximum under the Criminal Code for the same act or omission¹⁶⁹. The Supreme Court of Nigeria finally held that native courts were bound to conform to the Criminal Code in regard to sentences. The court also laid down that an appellate court may follow one of two options under the Criminal Code by either substituting the proper punishment, as provided under Section 67 (1) (b) (iii), or if for any reason it was unable to do so, order a retrial under Section 67 (1) (b) (ii) of the Code.

V. The Partition and Colonisation of Africa

On the eve of the partition of West Africa, in the 1870s, European influence in the area remained restricted to the forts and settlements built on the coast. Europeans had been trading with West Africa since the fifteenth century and yet, they had remarkably little influence on West African societies. This was not for the lack of trying, "...on the contrary it was the richness and diversity of the economies of West Africa which gave its societies the strength to withstand European influence"¹⁷⁰. Indeed on the eve of partition, "...what was apparent and a matter of grave concern (to the European powers), were West African strengths not weaknesses, assertiveness, not passivity"¹⁷¹.

From 1885 onwards, East Africa began to experience partition on a grand scale. Italy's

¹⁶⁹ *Malam Mammam Maizabo & Others v Sokoto Native Authority* (F.S.C. 5/1957).

¹⁷⁰ Cambridge History of Africa, Vol. 6, p. 40.

¹⁷¹ *ibid*, at p. 41.

claim to Somalia was internationally recognised in 1890¹⁷². Britain claimed the territory from the Juba river to Vanga¹⁷³ and the Portuguese extended their sphere of control to cover what is now Mozambique¹⁷⁴. At this stage, colonial influence was exercised through chartered companies but between 1888 and 1900 active conquest of East Africa took place which established the colonies¹⁷⁵.

The second major change brought about by colonialism is that the legal systems of Europe, mainly those of Britain and France, came to be firmly implanted in Africa and have become the general law. The Supreme Court Act of 1876 passed for the Gold Coast, for example, stated that;

The Common Law, the doctrines of equity, and the statutes of general application which were in force in England at the date when the colony obtained a local legislature, that is to say, on the 24th day of July 1874, shall be in force within the jurisdiction of the court¹⁷⁶.

This general law inevitably came to conflict with local legal systems and the techniques evolved to resolve these conflicts are dealt with below.

VI. Conflict between Customary Law and Legislation

The method chosen by the British colonial governments to resolve conflict between customary law and legislation was to declare customary law inapplicable when it conflicted with any law in force. This approach first appeared in the Gold Coast Colony Supreme Court Ordinance 1876 Section 19¹⁷⁷ which provided that customary law would not apply if it was;

¹⁷² The Cambridge History of Africa, Vol. 6, c.1870 – c. 1905. p. 567.

¹⁷³ *ibid*, at p. 567.

¹⁷⁴ *ibid*, at p. 567.

¹⁷⁵ *ibid*, at p. 567.

¹⁷⁶ Section 14. Nov. 4 1876. Enacted 31 March 1876.

“...incompatible either directly or by necessary implication with any enactment of the Colonial Legislature existing at the commencement of this Ordinance, or which may afterwards come into operation.”

What the provision did was to remove conflict resolution, in this area of law, from the courts. All that needed to be established was that the customary law rule relied upon by the party conflicted with an existing legislation in the colony. The Gold Coast provision was taken over in several British colonies¹⁷⁸, sometimes with slight modifications, such as “written laws” in place of “any enactment” in the Western Nigerian legislation.

The provision was modified in the case of Eastern and Central Africa. Thus, the Uganda Order in Council 1902 provided in Article 20 that customary law was inapplicable if it conflicted with any law,

“...or inconsistent with any Order in Council, Ordinance, or any regulation or rule made under any Order in Council or Ordinance....”

The Eastern and Southern African exclusion clause was wider than the West African provision.

When Ghana passed the Courts Act 1960¹⁷⁹, which introduced new conflicts rules, the incompatibility clause was excluded. Most probably, this was due to the new status the Courts Act had conferred on customary law. Customary law now had the same status as the common law as received in Ghana Customary law was no longer a matter of fact to be proved in court Section 67 of the Courts Act 1960¹⁸⁰ provided thus:

¹⁷⁷ No. 4.

¹⁷⁸ Nigeria: High Court of Lagos Act (Cap. 80), s.27 (1); former Eastern Region High Court Law 1955, S.34 (1); former Western Region High Court Law (Cap. 44) S.121(1).

¹⁷⁹ C.A. 9.

"(1)...any question as to the existence or content of a rule of customary law is a question of law for the court and not a question of fact."

In the colonial period however, it was not altogether clear whether the incompatibility clause referred only to legislation passed for the colony or whether it also included United Kingdom legislation and the common law and equity. In other words, would a customary law rule be struck down if it conflicted with United Kingdom legislation, but not with local colonial written law, or with the common law and equity? It is submitted that the provisions containing the exclusion clause referred to the colonies concerned and did not apply to United Kingdom legislation. Allott strongly argues that United Kingdom law was excluded from the incompatibility rule:

"It is submitted that this is to negate the whole purpose of recognising customary law, and to go behind the 'written law' in a way which would appear quite opposed to the original intention of the legislator"¹⁸¹.

It would seem that this is the correct position to take on this subject. Allott further cites L.C.B. Gower, writing on Nigeria, who states that;

"English common law or statutes of general application can never be incompatible with customary law for the simple reason that they have no application to the transaction governed by customary law"¹⁸².

This position however, was not held uniformly in the colonies. In the Northern Rhodesian case of *R. v Mubanga and Sakeni*¹⁸³, the court was called upon to consider whether a particular Bemba custom was inconsistent with the Northern Rhodesian Order in Council 1924, Article 36 of which provided that native law and custom would apply only if it was not

¹⁸⁰ C. A. 9.

¹⁸¹ Allott, p. 177.

¹⁸² (1964) 1 Nig. L. J. 73, at 74, n.11, in Allott at p.177, n.13.

¹⁸³ 1959 (II) R & N 169, N. R. H. Ct. Cited in Allott, p. 178.

“inconsistent with any Order in Council, Ordinance or Proclamation or any Order in Council, Ordinance or proclamation.”

In the opinion of the learned judge, Somerhough, J., even if the alleged Bemba custom at issue in this case were proved to exist;

“it would clearly be inconsistent with the Common Law and repugnant to justice if, by averring a breach of native law and custom, the effect could be achieved whereby an offence was created of counselling and procuring a person to do an act which, if that person did, he would not be committing an offence. The existence of such an offence is not only unknown to the Penal Code of this Territory but it is inconsistent with it, as it is with the Common Law; and on the face of it, and in the absence of any law to the contrary, that there should be such a law creating the offence of peacefully persuading a person or persons to withhold something or refrain from doing something which they are entitled to withhold or to refrain from doing, can be said to be inconsistent with other laws in force in the Territory and indeed, repugnant to justice.”¹⁸⁴

While it is correct to say that the alleged custom, if proved to exist, could be incompatible with the existing Order in Council and any other Ordinances, or repugnant to morality and justice, the view that the customary law rule could be incompatible with the common law is wrong. Further, it is difficult to accept that the customary law rule could be incompatible with the Penal Code, simply because the Penal Code knows no such parallel rule. The fact that the Order in Council uses the word “inconsistent” instead of “incompatible”, as in the Gold Coast legislation, should make no difference. Both words should be given the same meaning. In Gower’s view;

“...a [Nigerian] statute should be construed as not affecting a transaction governed by customary law unless it expressly, or by necessary implication provides to the

¹⁸⁴ At p. 179. Allott, p. 178.

contrary. The main argument in favour of this conclusion is the manifest absurdity which would otherwise result"¹⁸⁵.

The only difficulty in Gower's analysis is the expression "necessary implication", as Allott observes. How is the court to arrive at the conclusion that by necessary implication a customary law rule is incompatible with a piece of legislation? It appears that ;

"One must regretfully rely on the good sense of the judges, and echo Gower's hope that the whole matter be cleared up by the enactment of express rules to govern the point"¹⁸⁶.

VI. Types of Choice of Law in Africa

(i) Choice of Law in Geographically Separate Law Districts

The Federal Republic of Nigeria

Section 6 of the Nigerian Federal Constitution of 1979, vests judicial power in the Federal Courts and in the state courts. Nigeria consists of about thirty clearly demarcated federal states, each with its own judicial apparatus. For the federation, the Constitution has set up the Supreme Court, the Federal Court of Appeal and the Federal High Court. For the federal states, the structure consists of the State High Court, the *Sharia* and/or Customary Court of Appeal¹⁸⁷. Thus, the question of choice of law is settled once the matter is determined to be governed by the *Sharia*, Customary or general law. Nigeria is therefore one of the few West African countries left which has retained the colonial pattern of jurisdictional separation between the Common Law and local/*Sharia* law¹⁸⁸. Appeals from the state High Court and

¹⁸⁵ Gower, L. C. B; "Nigerian Statutes and Customary Law" (1964), 1 *Nig. L. J.* p. 73. Allott, p. 179.

¹⁸⁶ Allott, p. 180.

¹⁸⁷ Section 5.

¹⁸⁸ Countries which have abolished the "native courts" are; Senegal, Mali Niger, Benin,

the state *Sharia*/Customary law Courts of Appeal are allowed at the Federal Court of Appeal and from there to the Supreme Court. At the federal level therefore, jurisdiction has been fused.

Nigeria was constituted into a federation in 1954 by the Colonial Government when the Nigeria (Constitution) Order in Council came into force¹⁸⁹. The Order in Council established a Legislative House for the federation and for each region and a Supreme Court¹⁹⁰. In the exercise of establishing the federation, the Government relied heavily on the Australian experience. The Order provided for the "Procedure of Federal Supreme Court enforcement of Judgments", which was worded in similar terms as the provisions of the Federal Council of Australasia Act and the provisions of Section 51 of the Commonwealth of Australia Constitution Act¹⁹¹. The Governor-General, upon the authority of the Order in Council, enacted the Adaptation of Laws (Judicial Provisions) Order of 1955¹⁹². In a schedule to the new law, a new Sheriffs and Civil Process Ordinance was included, Part VII of which was entitled "Service of process and Enforcement of the Judgments of the Courts of Lagos, the Southern Cameroons and the Regions throughout Nigeria". This was largely a copy of Parts II and IV of the Australia Act¹⁹³.

As far as recognition of intrafederal judgments is concerned, it would seem that

"a regime of mutual recognition of judgments across the country is inherent in a federation"¹⁹⁴.

Nevertheless, in Nigeria, as in Australia, reliance has been placed on legislation to regulate

Cameroon, Ghana, Guinea, Gabon and Ivory Coast.

¹⁸⁹ Section 3 L.N. 102 (1954). This section on Nigeria is based on the unpublished Ph.D thesis by Tunde Ajibade of King's College London, entitled *Aspects of the Intrafederal Conflict of Laws*. Cited hereafter as Ajibade.

¹⁹⁰ Section 138, cited in Ajibade.

¹⁹¹ Ajibade, p. 204.

¹⁹² L. N. 47 (1955), Ajibade p. 205.

¹⁹³ *ibid*, at p. 205.

¹⁹⁴ The Canadian Supreme Court in *Morguard Investment Ltd v De Savoye* (1900) D. L. R. 4th 256. Ajibade, p. 293.

recognition, rather than to wait for individual cases to set the precedent. The service of writs and recognition of judgments is governed by the Sheriffs and Civil Process Act¹⁹⁵. The Act enables a state to serve a writ on a person residing in another state¹⁹⁶.

(ii) Choice of law in Geographically undivided Countries

In geographically undivided states, it is possible to have various legal systems operating side by side. This happens when the population of these units have different rules on certain matters, such as status, marriage or succession. Their proximity to each other enables contacts to be made at various levels, such as inter-marriage, succession to property in a "foreign" law district and so on. Geographically undivided countries form the usual pattern in inter-local conflict of laws in Africa.

(iii) Specially Constructed Choice of Law Rules for Inter-local Conflict of Laws

In some African countries, rules have been specially constructed for resolving inter-local conflict of laws¹⁹⁷. The rules are meant for the guidance of the courts in resolving inter-local conflict of laws in geographically undivided countries. The major difference between these types of rules and the federal type is that while the federal type rules are left to be formulated by the federal states to construct, the rules for the geographically undivided countries are always constructed by the central authority¹⁹⁸.

¹⁹⁵ Chap. 407. Vol.22, L.N. 1990. Ajibade, p. 211.

¹⁹⁶ Ajibade, p. 211.

¹⁹⁷ See for example, Ghana's Courts Act 1960, Section 66.

¹⁹⁸ See for example, the case of the former Soviet Union and former Czechoslovakia, Lasok, *15 Am. J. Comp. Law*, 1966, p. 330.

CHAPTER THREE

RELEVANCE OF PRIVATE INTERNATIONAL LAW RULES TO INTER-LOCAL CONFLICT OF LAWS

I. Introduction

There is the temptation to assume that the rules of private international law cannot apply to inter-local conflict of laws, since the two types of conflict of laws operate in different spheres, private international law between sovereign states while inter-local conflict of laws operates between various regions within the same sovereign state. In this chapter, the attempt will be made to show that the rules of private international law apply equally to inter-local conflict of laws, or at least must be applied by analogy where they cannot be applied directly.

The short historical account is to demonstrate that the basic concepts of private international law have originated from inter-local conflict of laws and that they have remained unchanged, in spite of the change in emphasis from the province or district to the sovereign state.

Finally, it will be shown that West African legal systems are territorially based and are not personal legal systems as some writers have suggested¹⁹⁹.

II. Historical Background of Inter-local Conflict of Laws

Towards the close of the Roman Republic and the beginning of the Empire, the Empire in Italy consisted of provinces and municipalities. Each province had its own magistrates and jurisdiction and in some cases even its own legislative powers. Inevitably, conflict of laws

¹⁹⁹ Lipstein and Szaszy; "Interpersonal Conflict of Laws", in *International Encyclopedia of Comparative Law*, Vol. 111, Chapter 10; Lampué; "Les conflits des lois interregionaux et interpersonnel", *Revue critique de droit international privé*, 1954, Vol. 43, p. 249.



resulted²⁰⁰.

Each individual was legally connected either with the City of Rome or with, at least, one of the provinces. The connecting factor was either citizenship or domicil. Citizenship was the result of *origo* (ie by birth, adoption, manumission or by election). *Origo* was transmitted through a person's father, if born legitimate, or through the mother, if born illegitimate.

Domicil was the place of permanent abode, freely chosen by the individual to govern his or her business relationships. Permanency was not interpreted to mean unchanging but was meant to exclude transitory presence in a territory. A person could always change domicil but presence in the province must be accompanied by the intention to remain.

Thus, a person could, theoretically, be a citizen by *origo*, that is be born into the community, freed into it or be elected into it, while at the same time maintaining a domicil in a different province²⁰¹. A woman who married into a "foreign" province did not lose her citizenship but retained it in abeyance, so that she could be relieved of her duties (*munera*) of citizenship. The same applied to a person who was elected to the senate in Rome and his descendants and to a soldier serving abroad²⁰².

Since a person could be connected with more than one province at once, the inevitable choice of law problems arose where the plaintiff and the defendant were connected with different provinces. In principle the suit could be brought in any of the provinces with which the defendant was connected. In Savigny's view however, the domicil would be preferred by the plaintiff because the defendant could be more easily reached²⁰³. If this was not possible, for example in the case of a manumitted slave, then any other *origo* was appropriate but only if the defendant had an *origo* in Italy, otherwise, his domicil was the appropriate forum. The forum in which the case was brought was crucial for each province, except the city of

²⁰⁰ This part of the historical account is based on Von Savigny: *A Treatise on the Conflict of Laws*, 1849, (Guthrie's translation). Cited hereafter as Savigny.

²⁰¹ Savigny, p. 48.

²⁰² *ibid*, at p. 48

²⁰³ *ibid*, at p. 69.

Rome, which enforced only its own territorial law to the total exclusion of other territorial law.

When it comes to personal law, Savigny held;

"...that when a person had origo and domicil in two different cities, the local law to which that person was subject was determined by origo and not by domicil"²⁰⁴.

This Savigny explains, is due to the fact that the origo was the closer tie, compared with domicil, "which depends on an arbitrary and capricious choice"²⁰⁵.

The barbarian conquest of Rome effectively brought to an end the territorial legal system and introduced the personal legal system into the former Roman Empire. Between the sixth and ninth centuries, each of the conquering tribes, Visigoths, the Lombard, the Burgundians etc, professed the law of their *nation* and not the law of the territory in which they were domiciled²⁰⁶.

By the end of the tenth century, the personal legal system gave way to the territorial legal system yet again. The reasons for this change were not the same everywhere. In the Germanic regions, north of the Alps, feudalism was the main cause. All who lived within a fief were subject to the manorial court and to the laws of the feudal overlord. The application of the law was territorial and governed all persons and transactions within the fief. The feudal lord had complete disregard for all "foreign" legal systems and did not accord any rights to a stranger. A person who left the fief for another, stood in danger of losing his property and his liberty and could not dispose of his property upon death. Personal rights were seen only as part of the feudal system for "Feudalism is the negation of personality"²⁰⁷. Thus conflict of laws could not exist in feudal society, which was rigidly

²⁰⁴ Savigny, p.76.

²⁰⁵ *ibid*, p. 76.

²⁰⁶ Cheshire and North; *Private International Law*, 11th Ed. P. 16.

²⁰⁷ Cheshire and North; *Private International Law*, 11th Ed. P. 16. This quotation has been retained, although it is no longer to be found in the 13th Edition.

organised and self-contained and had no use for neighbouring legal systems²⁰⁸.

The situation in the southern parts of Europe, especially Italy, was different. Here, the rebirth of the territorial legal system was due to the rise of the Italian city states and not to feudalism. Apart from the general law, which continued to be Roman, each city state had its own municipal legal system which portrayed individual variations between the cities. The diversity of these laws, especially in commercial practice, prompted some recognition of the laws of the other city states. This ultimately gave rise to the science of private international law²⁰⁹.

III. The Statutist Period

With the increase in commerce between the city states, Italian jurists came to realise that for rights to be enforceable in another city, one rule must be allowed to govern the same type of relationship. The father of this approach was Bartolus (1314-1357), who proceeded to list groups of relationships under a given rule of law²¹⁰.

The statutist classified each law as 'personal' or as concerning 'impersonal things', or as 'mixed personal and impersonal'. A 'real' statute was one whose principal object was to regulate things, a personal statute was one which concerned persons, while a mixed statute covered acts such as contracts. Real statutes applied only within the territory in which they were enacted and had no extra-territorial application. Personal statutes applied, not only in the territory in which the person was domiciled but also in other territories²¹¹.

By the sixteenth century, the statute theory had arrived in France, where the internal political organisation was such that a study of conflict of laws was imperative. France was divided into several provinces, each province with its own legal system, referred to as *coutume* or

²⁰⁸ *ibid*, at p.16.

²⁰⁹ Cheshire and North; *Private International Law*, 11th Ed. P.17.

²¹⁰ Wolff; *Private International Law*, 2nd Ed. 1950, p. 24.

²¹¹ Cheshire & North's *Private International Law*, 11th Ed. At p. 19. This historical comment has not been repeated in the 13th Edition. Cited hereafter as Cheshire &

custom. Commercial activity between the various provinces accounted for the inevitable conflict between the *coutumes*. The most notable among the French jurists were Dumoulin (1500-66), D'Argentre (1519-90) and Guy Coquille (1523-1603)²¹². Dumoulin was the first jurist to develop the theory that the law which governs a contract was the law intended by the parties. For D'Argentre however, freedom of the parties to choose the applicable law was to be discouraged. He was territorially-minded and supported the autonomy of the provinces²¹³. Niboyet has accused him of overemphasising the territorial nature of law and of always proceeding from the viewpoint of Brittany, his home province²¹⁴.

The seventeenth century saw the ascendancy of the Dutch statisticians, who based their fundamental principle on the exclusive sovereignty of states. Like France, the United Netherlands consisted of several provinces, each with its own legal system and with the same need to resolve legal conflicts. De Nova suggests that the extensive maritime and commercial interests of the Dutch may have prompted them to consider conflict of laws between sovereign states²¹⁵.

The most prominent jurist among the Dutch school was Huber. While admitting that the applicable law was territorial law, Huber also stressed that foreign law ought to apply for reasons of comity. Thus, the application of foreign law was a matter of free choice for the sovereign state to make but in the knowledge that this comity will be returned by the other state. Huber laid down three maxims which he considered sufficient for the resolution of conflict problems:-

(a) The laws of a state have absolute force within, but only within the territorial limits of its sovereignty;

(b) All persons who, whether permanently or temporarily, are found within the territory of a

North.

²¹² *ibid*, at p. 20. These historical observations have not been repeated in the 13th Ed.

²¹³ *ibid*, at p. 21.

²¹⁴ *Traité de droit international privé français*, 1944, Vol.111, p. 79.

sovereign are deemed to be his subjects and as such are bound by his laws;

(c) By reason of comity however, every sovereign admits that a law which has already operated in the country of its origin shall retain its force everywhere, provided that this will not prejudice the subjects of the sovereign by whom its recognition is sought²¹⁶.

With the commercial activities of the Dutch in mind, Huber pointed out that nothing could be more destructive for commerce than to extinguish rights validly acquired elsewhere, merely because they were unknown to the *lex fori* or conflicted with its rule on the issue. Thus, all rights acquired and transactions effected according to the law of a place are to be recognised even if the *lex fori* would have regarded them as void if effected according to that law. Huber's theory, therefore, eliminated arbitrariness and established a certain customary international law, in spite of the free will of the sovereign state to apply foreign law.

The importance of the statistists was the emphasis they placed on the intrinsic nature of the rules of conflict themselves. The rules had in them

"...a peculiar power that made them effective everywhere in relation to certain sets of facts."²¹⁷

Thus, for the first time, it became irrelevant how widely different the local rules were, since the same rules of conflict resolution could be applied. It is important to note that the internationalisation of conflict rules did not prompt the suggestion that different rules ought to be adopted for inter-local conflict of laws. The same rules continued to apply to both types of conflicts as long as provinces remained autonomous.

²¹⁵ (1966) *11 Rec. des cours*, pp. 441-447.

²¹⁶ Lorenzen; *Selected Articles on Conflict of Laws*, 1947, Chapter 6.

²¹⁷ De Nova; "Natura del diritto interlocale", 1940, *Riv. Dir. Int.* p. 441. Translation in *International Encyclopedia of Comparative Law*, Chapter 9; "Interlocal Conflict of Laws", by Edoardo Vitta.

IV. Savigny's Theory

In Savigny's view, the statist theory and all its forerunners were not scientifically constructed and were therefore of little use in resolving international conflict of laws. He objected to Huber's suggestion of territorial sovereignty, which obliged the court to apply the *lex fori*, except where the case involved rights already vested under some foreign law. The question whether a right has been acquired under a foreign law could only be determined by reference to that foreign law. Therefore, each time foreign law is pleaded, the court is obliged to refer to that foreign law, which alone could determine that a right has been acquired. Hence Huber's argument that the court must apply its own law exclusively, except where a right is already vested under foreign law, is circular²¹⁸.

Savigny sought to develop a more scientific approach to the problem. Instead of classifying laws according to their object, as the statisticians had done, Savigny held that for every legal relationship, there was a local law which was its proper and natural seat and it is that law which must apply when it differs from the law of the *lex fori*²¹⁹. To determine that natural seat, the court must consider the following:-

- (a) the domicile of a person affected by the legal relationship,
- (b) the place where a thing, which is the object of a legal relationship, is situated,
- (c) the place where a juridical act is done,
- (d) the place where a tribunal sits²²⁰.

Yntema criticises the theory, for Savigny seems to assume that legal relations are uniform in all legal systems and therefore a natural seat can be found in each case²²¹. As Cheshire and North point out, a person who breaks a promise to marry, may commit breach of contract in

²¹⁸ Savigny, pp. 102-103.

²¹⁹ Savigny, p. 89.

²²⁰ *ibid*, at p. 96.

²²¹ Yntema; "The Historic Bases of Private International Law", 2 *Am. J. Comp. Law*, (1953), p. 296.

one legal system but a tort in another and in a third, no legal wrong at all. Determining a legal seat may not be easy²²². Nevertheless, Savigny's theory is still valid in a general sense, if only because the court still attempts to decide each case according to the legal system in which it appears to have its most natural domain.

V. Modern Developments

In spite of the internationalisation of conflict of law rules, theories based on the territoriality principle have persisted into the twentieth century. Huber's territoriality theory had a profound effect on Anglo-Saxon jurists, especially on Dicey²²³ in England and on Beale²²⁴ in the United States of America. The theory of "vested" or "acquired rights", as it came to be called, is based directly on Huber's theory that a court must not recognise or enforce foreign laws or judgments, for only *lex fori* can govern all cases which come before it. The court must however, protect rights which have already been acquired by a party under foreign law or a foreign judgment, and in doing so, the judge is merely administering private international law, not enforcing foreign law:

“English judges never in strictness enforce the laws of any country but their own, and when they are popularly said to enforce a foreign law, what they enforce is not a foreign law but a right acquired under the law of a foreign country.”²²⁵

The theory has been severely attacked by leading jurists²²⁶ and "receives scant support at the present day"²²⁷. One of the primary functions of a court is to protect legally acquired rights, even if these have been acquired in a foreign forum. In any case "...to protect a right is to give effect to the legal system which gave birth to it, for a right is not a self-evident fact, but

²²² Cheshire and North, p. 24. Not repeated in the 13th Edition.

²²³ See Dicey's *Conflict of Laws*, p. 17, 1st. Edition.

²²⁴ See Beale; *Conflict of Laws*, 1935, pp. 1967-1969.

²²⁵ Dicey, 5th Ed. p. 18.

²²⁶ Arminjon; 44 *Rec. des cours* (1933 II), pp. 1-105; Kahn-Freund; 143 *Rec. des cours* (1974 III), p. 147. Hereafter cited as Kahn-Freund.

²²⁷ Cheshire and North, p. 25.

a conclusion of law"²²⁸.

However, Savigny's complaint of the circular nature of the territoriality argument is still valid, for in order to enforce the *lex fori*, the court must first consult foreign law to ascertain whether the party has acquired a right under it.

Another theory that has come out of the United States of America is the "Local Law Theory". Its main proponent is Cook²²⁹. The theory holds that the court of a forum recognises and enforces a right created by its own law only. The court applies its own rules to the total exclusion of foreign rules. However, for reasons of social expediency and practical convenience, the court takes account of the laws of a foreign country. The forum creates its own right but fashions it closely upon the law of the country in which the decisive facts have occurred.

It is not clear what purpose this theory is to serve beyond stating the fact that a forum must apply its own laws. Yntema has described it as sterile truism²³⁰. Further, the local law theory does not explain why or when it is necessary to refer to foreign law in the first place. In a sense, it is an explanation of what has happened rather than a theory.

To sum up, the position remains that the *lex fori* applies unless there is a foreign issue and the court realises that its own positive rules may not be best suited to the resolution of the issue. The position is the same whether the conflict is inter-local or international.

VI. Application of Private International Law Rules to Inter-local Conflict of Laws.

There is disagreement among legal commentators as to whether the legal nature of inter-local conflict of laws can be formulated in terms similar to those of private international law. Although most jurists admit that there are similarities between international and inter-

²²⁸ *ibid*, at p. 25.

²²⁹ Cook; *Logical and Legal Bases of the Conflict of Laws*, 1942, Chapter 1.

²³⁰ "The Historic Bases of Private International Law", 2 *Am. J. Comp. Law*, 1953, pp. 297- 317.

local conflict of laws, they are not agreed that the same rules should apply to both. Those who admit there are similarities between the two types of conflicts point either to similarity of problems, for example, choice of law, or to the techniques applied in resolving conflicts. Adherents of this group also hold that a single definition of the two types of conflicts is indeed possible. This is a position usually held by jurists of the common law tradition²³¹. Some leading German jurists also belong to this school and accept that the two types of conflicts are two sides of the same coin. Thus, Savigny declared that the rules are always the same²³². Von Bar even claimed that it is irrational to attempt to distinguish between the two types of conflicts²³³.

Opponents of equal treatment of the two types of conflicts argue that the two occur within quite different frameworks, the one within a state with composite legal systems and the other between sovereign states with which the issues are connected. More importantly, they argue that inter-local conflict rules are subject to unfettered regulation by the state and therefore are unlikely to conform to internationally accepted standards²³⁴.

An intermediate view held by Kahn-Freund maintains that the two types of conflicts are essentially equal, subject to certain exceptions. Essentially, however, the difference between the two types of conflicts can be expressed "more in terms of attitudes or tendencies and not in terms of rules"²³⁵. He observes that courts have a greater inclination to apply other local laws than they have in relation to purely foreign ones.

Prominent among legal writers who deny any similarities between the two types of conflicts

²³¹ Graveson; *Conflict of Laws* 2nd Ed. 1974; Kahn-Freund; "General Problems of Private International Law", 143 *Rec. des cours*, (1974 III) p. 464 - 465; US Restatement 2nd.

²³² Savigny; Ch.10, p. 23.

²³³ Bar, Von; *Theorie und Praxis des Internationalen Privatrechts*, 2nd Ed. 1889, pp. 136-141. Modern German writers who hold similar views are Wengler: "The General Principles of Private International Law", (1961) 111 *Rec. de cours*, p.104; Neuhaus; *Die Grundbegriffe des Internationalen Privatrecht*, 2nd Ed. 1976.

²³⁴ This was a view held by Bartin; *Principes de droit international privé*, 1930, p. 37.

²³⁵ Kahn-Freund, at p. 465.

is Anthony Allott. He maintains that:

“There is a temptation to think that the easy way of dealing with internal conflicts is to proceed on the analogy of Private International Law, except where one is expressly prevented from doing so by the contrary word of a particular statute. This approach, with respect, is a totally fallacious one.”²³⁶

Allott's reasons for holding this radical view are that a court deciding a case involving inter-local conflict of laws must first look at any statute specifically regulating the issue. If the issue is not regulated by statute then the court must turn to the statute controlling the court which, in the case of Africa, always contains instructions to the court as to what law to apply to a specific issue. Only in the absence of statutory guidance is a court permitted to apply rules of private international law²³⁷. It is not clear why the situation as illustrated by Allott proves that private international law rules cannot apply to inter-local conflict situations.

Courts are always expected to apply statutory law, whether in a case involving conflict of laws or in a purely domestic situation. It is only in the absence of statutory provisions that a court may resort to the common law or to any other law. A court, dealing with an issue involving inter-local conflicts of law will have to follow the same procedure. Secondly, Allott's conclusion that the court must therefore do what "the statutes tell it to do, and not what it might have done had the case involved external conflict problems", is not convincing. Allott appears to be suggesting that private international law rules have an existence of their own outside the legal system in which they operate and that the very existence of codified law must negate the application of private international law rules. In other words, what statute law instructs the court to do, cannot be described as private international law. This position is untenable. Private international law rules have been codified in many jurisdictions since the subject came to be identified to have its own existence, as demonstrated in the earlier parts of this chapter. The logical conclusion to be drawn from Allott's argument is that any time statute obliges the court to apply a rule of

²³⁶ Allott, pp. 115-117.

²³⁷ Allott, p. 112.

conflict of laws, that rule ceases to be a rule of conflict of laws.

Allott further argues that the connecting factor in international conflicts does not resemble the connecting factor in inter-local conflicts. He adds:

“Private International Law operates from the concept of a discrete and intact personal law for each individual (your personal law may be the law of your domicile or your nationality) but in any event, you will be referred to a national legal system.”²³⁸

It is not clear what "discrete and intact personal law" is supposed to mean but the assumption that one is always referred to a national legal system is incorrect. States which operate plural legal systems always refer to a particular law district within the state, unless a special national connecting factor has been created for a specific purpose, such as federal law on marriage and divorce in Canada and Australia²³⁹. Indeed unitary states with plural legal systems, applying nationality as a connecting factor, often devise their own methods to identify the correct law district, such as the *vencidad civil* in Spain²⁴⁰.

The choice of a connecting factor in private international law or inter-local conflict of laws is merely to decide in advance the law which will govern the individual in matters of status and personal acts, such as capacity. In some cases, it can be wholly technical, as in the case of nationality, habitual residence or domicile in the American sense, as these may be changed at will with little or no ceremony. It is difficult to understand what is supposed to be "discrete and intact" about a connecting factor.

The main difference between private international law and inter-local conflict of laws is that inter-local conflict of laws develops within one sovereign state and therefore operates within the constraints set for it by the central government. Apart from these "rules of legislative

²³⁸ *ibid*, at p. 116.

²³⁹ Canada; Dominion Divorce Act 1967-68, S.5 (1)(a).

²⁴⁰ Civil Code Art. 22. "Civil neighbourhood".

jurisdiction"²⁴¹, the inter-local conflict rules themselves have their counterparts in international conflict rules.

Nevertheless, it is this control by central government that has prompted Bartin to argue that inter-local conflict of laws are not genuine conflicts of law. According to Bartin, commenting on conflict of laws in French colonies, in international conflicts, the judge chooses between the laws of the same origin promulgated by states of equal sovereignty. In the *conflits coloniaux* (as he refers to inter-local conflicts in the colonies), on the other hand, it was the sovereign act of France alone which permitted the application of local law. Therefore, equal respect between the laws, which is essential in private international law, is absent²⁴². Kouassigan has refuted this argument by stating that in international conflict of laws, the conflict is not between sovereignties but between the laws of sovereign states²⁴³. In any case, the equal respect that Bartin speaks of is to be found between the various law districts within the state and it must be irrelevant that sovereignty resides in a colonial power.

The similarities between the rules of private international law and inter-local conflict of laws are so striking that it is useful to examine some of them.

a) *Connecting factors*

Like international conflicts, inter-local conflicts connect the relevant facts with the various local legal systems by means of connecting factors. Even where a different terminology is used, such as "personal law", instead of law of "domicil", the private international law concept of a connecting factor is being contemplated by analogy. There could be problems in finding an alternative however, where the concept for determining the international connecting factor is nationality, as this is impossible to apply within the local legal systems.

²⁴¹ Edoardo Vitta "Interlocal Conflict of Laws" in *International Encyclopedia of Comparative Law*, Vol.111, Chp.10, pp. 20-21. Hereafter cited as Edoardo Vitta.

²⁴² Bartin; *Principes de droit international privé*, 1930, p. 17.

²⁴³ Kouassigan; "Des conflits interpersonnels et internationaux des lois et de leurs incidences sur la forme du mariage en Afrique noire francophone", *Revue critique de*

This has led Lampué²⁴⁴ to observe that where French law applies, it might be impossible to apply a connecting factor in inter-local conflict of laws. Some countries which apply the nationality test, have evolved two possibilities of solving this problem. The first is to adopt for inter-local conflict of laws, a test other than nationality but one which closely resembles it and concentrates on the individual character of the person. This is the test adopted in Spain whereby the personal law of the individual is determined by the *vencidad civil* or "civil neighbourhood", by which a region or a district connection is acquired, in principle by descent but there are provisions for the individual to opt out by acquiring a habitual residence in another region or by marriage, in the case of women²⁴⁵.

The second method of resolving the problem is to retain nationality as a connecting factor in determining issues involving international conflicts but to adopt a test of domicile for inter-local conflict of laws. This was the method preferred by a number of countries which no longer possess composite legal systems, such as Poland, Greece and the former Czechoslovakia²⁴⁶.

ii) Characterisation

Characterisation is another concept which inter-local conflicts share with international conflict of laws. By characterisation of the cause of action is meant;

"...the allocation of the question raised by the factual situation before the court to its correct legal category. Its objective is to reveal the relevant rule for the choice of law"²⁴⁷.

Whenever a case containing a foreign element comes before a court, the court will have to determine, first, that it has jurisdiction. Where the court sits in a jurisdiction with inter-local

droit international privé, 1978, p. 641.

²⁴⁴ Lampué; "Les Conflits des lois interregionaux et interpersonnel", *Revue critique de droit international privé*, 1954, Vol. 43, p. 252.

²⁴⁵ Civil Code Art. 22.

²⁴⁶ Edoardo Vitta, at p. 21.

conflict of laws, the court almost always has jurisdiction, except where there are religious courts with exclusive jurisdiction in religious matters. Second, the court must decide which area of law is covered by the case. Is it divorce, capacity to marry, succession and so on. Third, the court must determine which legal system governs the issue. This is done by referring to the connecting factor of the parties, or in the case of African inter-local conflict of laws, the personal law or customary law of the parties.

However, there could be problems where each legal system classifies the issue differently. Such may be the case for example, where one legal system classifies property as falling under the law of succession while the other sees it as covered by matrimonial law²⁴⁸. A court in an inter-local conflicts case may be faced with the same difficulty. For example, a woman from a matrilineal system in Ghana marries a man from a patrilineal system. The woman dies intestate. According to matrilineal rules of succession, her property would pass to her maternal nieces and nephews. However, the law of her husband's patrilineal system may characterise the issue as governed by matrimonial law and award the property to the children and spouse of the deceased wife.

iii) Public Policy

In international conflict of laws, public policy plays an important role in limiting the application of foreign law. In inter-local conflicts however, the doctrine appears to be of value mainly in intra-federal situations. Vitta maintains that in principle, a local court could evoke the doctrine to protect the way of life in the region²⁴⁹. Thus, he argues, the operation of public policy should be allowed, not only in federal states but also in unitary states with plural legal systems.

Some legal writers are not so certain about the usefulness of the doctrine in unitary states with plural legal systems and hold that public policy can only apply in intra-federal conflict of laws. Some Belgian and French writers who favour this approach therefore classify intra-

²⁴⁷ Cheshire and North; *Private International Law*, 13th Ed. 1999, p. 36.

²⁴⁸ *ibid*, at p. 37.

federal and international application of public policy together but exclude the use of the doctrine in unitary states with plural legal systems. They make only two exceptions, in the case of annexation and in the colonies²⁵⁰. In England the courts have held that public policy would be applied to preclude the recognition of the laws of Commonwealth countries²⁵¹ but have never excluded the application of laws of another law district within the United Kingdom. Anton argues that the application of the doctrine in England would be contrary to the notion of supremacy of parliament²⁵².

In the African colonies however, both British and French colonial administrations applied the public policy doctrine to exclude the application of local law. Typical of the British approach was the provision in colonial legislation that "law or custom" existing in the colony would be observed and enforced unless the law or custom was "repugnant to natural justice, equity and good conscience"²⁵³. This provision was interpreted far more widely than in England itself²⁵⁴. In most post-colonial legislation, the repugnancy clause has been retained as demonstrated by section 49 of the Ghana Courts Act 1971, on choice of law.

In French colonies, the French doctrine of *ordre public* was applied but with the difference that French law was regarded as superior to local law and whenever there was conflict

²⁴⁹ *ibid*, at p. 21.

²⁵⁰ In France the courts and legal writers adopted this view after the annexation of Alsace-Lorraine. The argument being that an annexed territory is separate entity as far as legal systems are concerned. The main proponents of this view are Batiffol & Lagarde; *Droit international privé*, 7th Ed. 1980, p. 418. In Belgium the view was adopted to apply to conflicts between metropolitan and colonial laws. Rigaux, François; *Droit international privé*, 1977-78, p. 355. In England, only Kahn-Freund has indicated some support for the application of the doctrine in inter-local conflicts but adds: "But I am putting this forward very tentatively; the matter is in need of further investigation". In "General Problems of Private International Law", *143 Rec. des cours* (1974 III) p. 464.

²⁵¹ *Gray v Formosa (as Formosa v Formosa)*, [1962] 3 W. L. R. 1246, where it was held that the Maltese law which required the observance of the Catholic form of marriage by a Maltese abroad, was contrary to public policy.

²⁵² Anton; *Private International Law, A Treatise from the Standpoint of Scots Law*, 2nd Ed. 1967, p. 85.

²⁵³ S.19, Supreme Court Ordinance 1876, on choice of law for the Gold Coast Colony.

²⁵⁴ Matson; "Internal Conflict of Laws in the Gold Coast", *16 M. L. R* (1953), p. 469.

between the two, French law prevailed²⁵⁵. Some former French colonies have abolished this hierarchical application of the doctrine, notably Senegal, Niger and Madagascar²⁵⁶.

The doctrine of public policy has a role to play in inter-local conflict of laws in Africa. It should be possible, for example, to apply the public policy doctrine to prohibit child marriage in an ethnic community which does not believe in it.

Thus, the same problems and the techniques for their resolution arise in both international and inter-local conflict of laws. The similarities between the two types of conflicts are most striking where the local legal system is autonomous and complete. The more autonomous the legal system is, the closer are its rules to those of international conflict of laws. For practical reasons, it is advantageous to apply the same rules to both types of conflict of laws, for it facilitates the solution of mixed international and inter-local conflicts. Secondly, the use of the same rules is likely to help to harmonise conflicts rules generally.

VII. Inter-local and Inter-personal Conflict of Laws Contrasted

Inter-local conflict of laws denotes the existence of various "law districts" within the one sovereign state but its main feature is that it is based on territory. Inter-personal conflict of laws, on the other hand, involves the operation, within a single state or territory or across territorial boundaries, of competing norms affecting particular groups, characterised by their personal traits or beliefs²⁵⁷. The usual circumstances in which inter-personal conflicts may arise are when religious groups profess religions which also contain a code of law for their members, such as Judaism, Islam or Buddhism. What becomes immediately clear is that a local legal system is based on territory while a personal legal system remains an attribute of the individual claiming to belong to a religious or racial group. Thus, while the connecting factor in the case of a territorially-based system is derived from the territory and remains

²⁵⁵ Francescakis; "Problèmes de droit international privé de l'Afrique noire indépendante", *112 Rec. des cours (1964 II)* p. 305.

²⁵⁶ Ordonnance sénégalaise, 14 nov. 1960, art. 19; Loi nigérienne 16 mars 1962, art. 52-54; Ordonnance malagache 5 nov. 1960, art. 21.

²⁵⁷ Lipstein & Szaszy; "Interpersonal Conflict of Laws" in *Encyclopedia of Comparative*

constant, the connecting factor in a personal legal system depends on the religious convictions of the individual or the race to which he or she claims to belong. The ascertainment of the connecting factor therefore depends on the state of mind of the individual. In *Att. General of Ceylon v Reid*²⁵⁸ the Privy Council held that in a country with plural personal legal systems, there is an inherent right in the inhabitants domiciled there, to change their religion and personal law.

The facts in *Att. General of Ceylon v Reid* involved a married couple in Ceylon (now Sri Lanka), who contracted their marriage before the Registrar in England. The husband later converted to Islam in Ceylon and married a second wife, as he was entitled to do under Islamic law. The question for the court to consider was whether the second "marriage" was valid. The Privy Council held that the second marriage was valid, for the personal law of the husband was now Islamic law, which determined the essential validity of the marriage, including its potentially polygamous nature.

The instability in the connecting factor of a personal legal system can cause social uncertainty and increase tension instead of minimising it.

David Pearl²⁵⁹ has sought to introduce some certainty into the connecting factor of a personal legal system by suggesting that where a Moslem male marries a Christian woman according to non-Moslem law (eg English law), the law governing the dissolution of the marriage should also be the law which is both the *lex loci celebrationis* and the law of domicil of the woman. As a parallel to this view Pearl suggests that;

²⁵⁸ *Law*, Vol.111, Chapter 10, p. 3.
[1965] A C 720.

²⁵⁹ Pearl, David; *Interpersonal Conflict of Laws in India, Pakistan and Bangladesh*, 1981, p. 71. French colonial administration in West Africa applied a regime similar to Pearl's concept. The decree of 1931, Décret réorganisant le justice indigène en Afrique occidentale française, 3 dec.1931, provided that in matters of marriage, divorce and custody, the local customary law followed by the parties at the time of the marriage applied, failing which, the local customary law of the wife applied. The decree was meant to protect the rights of non- Moslem wives whose husbands had converted to Islam at the time of the divorce but were non-Moslem at

“...the law which governs the dissolution of a marriage between a Moslem male and a Christian female celebrated in a Moslem form, is the law of the celebration and of the personal law of the husband both at the time of the dissolution and at the time of the marriage.”²⁶⁰

However, there is no principle in law which suggests that the *lex loci celebrationis* should also be the law which governs the divorce. The point was raised in *Jatoi v Jatoi*²⁶¹ but was unanimously rejected by the Supreme Court of Pakistan. The court accepted a divorce by *Talaq* by the Moslem husband as effective, even though the wife was of the Christian faith and non-Pakistani and the marriage took place in England, according to English law. Secondly, Pearl's solution would fail where the law of the Christian wife's domicile is different from the *lex loci celebrationis*. Lastly, there is no reason why a Christian wife should be given a privilege which wives of other religious denominations cannot have. The parallel that the Moslem husband married to a Christian woman according to Islamic law, should be able to divorce according to the law of the husband at the time of the marriage and of the divorce, is not likely to impose any legal burden on the husband and is of no benefit to the Christian wife.

The other major difference between inter-local and interpersonal conflicts is that, while a judge faced with inter-local conflict of laws actually has to decide which of the competing laws will govern the issue, a true conflict situation rarely arises in interpersonal conflicts. All that the judge can do is to determine whether the individual is or is not a member of the group. After the determination that he or she belongs, the law of the group is applied, to the exclusion of any other competing law involved in the matter. The judge is not called upon to choose between conflicting legal rules of two or more systems²⁶².

Even where the court is secular, the opportunity to apply conflict rules is limited. Egyptian

the time of the marriage.

²⁶⁰ *ibid*, at p. 71.

²⁶¹ (1967) P. L. D, SC, p. 580.

²⁶² Lipstein & Szaszy, p. 30.

courts have had the power to apply religious law since 1955 but the courts are faced with a choice of law only in two situations:

- (i) in what circumstances can religious law apply in the case, as opposed to statute law? Where the parties are foreigners, foreign law will apply according to the rules of private international law, except where one of the parties is Egyptian and pleads religious law. The court must apply the relevant religious law²⁶³.
- (ii) Where the court must apply religious law to the exclusion of statute law. This is usually the case in matters of personal status²⁶⁴.

There cannot be a conflict between the rules of two religious groups, except in the rare case where two religions lay claim to the same individual. This is possible where, for example, a Jewish male, who had married a Jewish woman according to Hebrew law, later converts to Islam and a child is born thereafter. Islamic law traces membership of the religion through the father, while Hebrew law traces it through the mother. But even here, the conflict situation may be eliminated, for Egyptian law provides that the law of the father prevails²⁶⁵. The other possibility of conflict is where two people of different religions with personal codes of law marry, for example, where a Jewish male marries a Moslem woman, or *vice versa*.

The closest a secular court can come to applying choice of law rules to religious law is where the parties belong to the same region but are of different sects, such as the Maliki and Hanafi of North Africa. But even here, it is more likely that Hanafi law will apply automatically in Egypt, while Maliki law will apply in, say, Algeria. In practice though, where society is fairly homogenous in religion, such as in the Middle East and North Africa, inter-personal conflicts are rare. It is therefore impracticable to apply private international law rules to inter-personal conflict of laws.

²⁶³ Civil Code Articles 11 - 28.

²⁶⁴ The definition of 'personal status' is contained in Law No.147 of 1949, Art. 13.

Inter-local conflict of laws, on the other hand, involves a genuine conflict of laws and as shown above, employs similar rules and techniques as private international law. African legal systems are largely inter-local, as opposed to inter-personal, and therefore conflict rules will be applied to them.

VIII. African Legal Systems – Inter-local or Inter-personal?

Some legal writers on internal conflict of laws in Africa, tend to assume that the conflict of laws found there is of a personal nature and not inter-local. According to Professor Szaszy, African and Asian legal systems are purely personal²⁶⁶, for they lack territorial basis, although they relate to the territory within which they are found. Territory is therefore "not a constitutive element of the idea of a personal legal system, it is merely a framework of it"²⁶⁷. While the statement may be valid for personal legal systems, it does not apply to Africa, as will be shown in this part of the study.

Territorial application of law has been known to Africa as far back as can be recorded. In the ancient Ghana Empire²⁶⁸, the 'personal law' of the individual was the law of the district from which he or she came. When Moslem traders arrived in the Empire to settle and to trade, the Askiya (the Emperor), obliged them to settle in one place so that Islamic law would apply to the settlement. The most famous of these settlements was Timbuktu, which came to be larger and more prosperous than the imperial capital, Gao, upon which it was dependent²⁶⁹. By 1352, during Ibn Battuta's second visit to Timbuktu the pattern had been well established. The merchants of the city were exclusively Moslem and had their own courts, presided over by the Qadi and applied the Sharia law of the Maliki sect. The Governor of Timbuktu, the Timbuktu-koi and his officials were the only non-settler officials

²⁶⁵ Civil Code Articles 124 & 129.

²⁶⁶ Szaszy; *Conflict of Laws in Western, Socialist and Developing Countries*, 1974, p. 293.

²⁶⁷ *ibid*, at p. 293.

²⁶⁸ About AD 300 - 1076.

²⁶⁹ Cambridge History of Africa, Vol. 2, 500 BC – AD 1050, p.668. Boril, E. W; *The Golden Trade of the Moors*, 1958; Ibn Battuta; *Travels in Asia and Africa 1325 - 1354*.

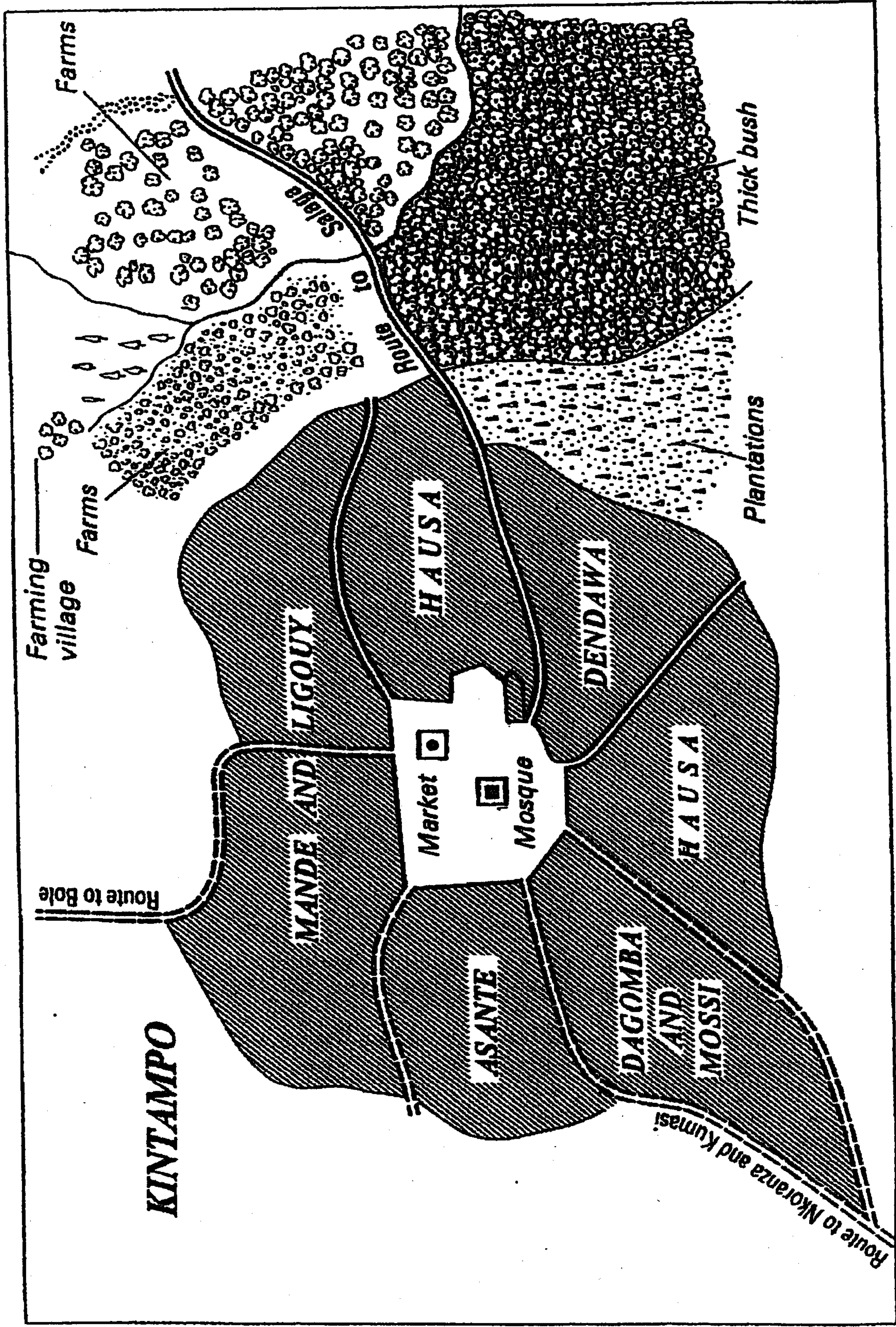


FIG. 25.2 Kintampo: a trading town in the Gold Coast hinterland (after L. G. Singer, 1892). From *History of Africa*, p.689, by UNESCO. There seems to be a spelling mistake in the name 'Singer'. There is no reference to it in the bibliography but there is reference at footnote 55 on p.692 to 'L.G. Binger'. Both the initials and the year 1892 are consistent on pp.689, 692 & 801.

in the city and had no judicial function²⁷⁰, an indication that only Moslem law applied in Timbuktu.

On the coast of what is now modern Ghana, settlements of merchants from the neighbouring interior were reported by Dutch travellers to be treated in much the same way²⁷¹. Modern Ghana itself has retained the territorial nature of its legal system. A senior judicial adviser during British colonial administration wrote in 1953:

“In the Gold Coast there are five or six major distinct regions wherein the customary law differs from that of the neighbouring areas, and there is a good deal of migration from one to another, particularly into the forest country which will support cocoa from areas with drier climate. There are obviously great opportunities for conflict of laws, not only between English law and customary law, but between different systems of the latter type”²⁷².

To maintain the territorial application of law in the face of this constant movement of people, the local chief would allocate land to the ‘strangers’, as they are often called, to build their own community (sometimes called *Zongo*), under their own chief, enforcing their own laws²⁷³. Whenever necessary, the community chief would represent the settler community at the local court, explaining matters concerning the law of his community. When the strangers were too few to form a community, the local chief appointed one of his officials to deal with them as an intermediary. It was the function of this official to collect the relevant law on any subject to be presented in a case involving a stranger and a local. The map of Kintampo on the next page illustrates the point accurately. Kintampo, now in modern Ghana, was a famous trading town on the route to the Sahel region, where gold and salt were sold to

²⁷⁰ *ibid*, at p. 668.

²⁷¹ Pieter de Marees; “A Description and Historical Declaration of the Golden Kingdom of Guinea, Otherwise called the Golden Coast of Myna”, 1602, cited in *Pageant of Ghana*, Ed. Wolfson, Freda, 1958, p. 86.

²⁷² Matson, J. N; “Internal Conflict of Laws in the Gold Coast”, *16 M. L. R.* (1953), p. 471.

²⁷³ Skinne, Elliot P; “Strangers in West African Societies”, *Africa, Vol. XXXiii, No. 4*, October 1963, p. 568.

merchants who transported these commodities to the Mediterranean. The town was divided into as many sectors as there were people of different origins who applied their own laws and religions in their sectors.

Even in Islamic areas of Africa, the Sharia has not replaced the territorial nature of the legal systems. In Northern Nigeria, Islamic law is the general law and yet the Islamic law practised at the Alkali's ²⁷⁴ court has received heavy doses of the local legal systems, especially in matters of land and succession to immovable property, thus explaining

“the territorial basis on which the law is intended to be applied in Nigeria - thus avoiding the confusion consequent on every individual being subject to the personal law of his own religion.”²⁷⁵

In Ghana, the hold of Islam on the communities is much weaker than in Northern Nigeria. Ghanaians from the north of the country, where Islam is generally practised, profess the religion only when they come to the south, to non-Islamic areas;

“whereas in their native setting the overwhelming majority are frankly pagan and the Islam of the minority is skin-deep.”²⁷⁶

In Ghana therefore, it is the local legal system which provides the connecting factor, not religion.

The reasons for this weakness of the Islamic hold on Ghana are twofold. First, there had never been a *Jihad* or holy war in Ghana and therefore, there is nothing resembling the powerful Hausa/Fulani Emirates of Northern Nigeria in Ghana²⁷⁷. Second, Islamic law never became part of the local legal systems, as is the case in Northern Nigeria. Islam

²⁷⁴ The Hausa for *al-Qadi*.

²⁷⁵ Anderson, J. N; *Islamic Law in Africa*, 1970, p. 172.

²⁷⁶ *ibid*, p. 249.

²⁷⁷ *ibid*, at p. 249.

arrived in Ghana through missionary activity and was never imposed on the people. Ghanaian Moslems have therefore come to accept Islam only as a religion (much as Ghanaian Christians accept Christianity) and not as a legal system.

In this study therefore, African legal systems will be treated as territorially based and the legal conflicts will be treated as inter-local conflict of laws.

CHAPTER FOUR

CHOICE OF LAW IN AFRICA

I. A note on Approaches to Choice of Law in Plural-legal Systems

Inter-local conflict of laws has been known to Africa since ancient times and the choice of law problems have been approached in the same way as in other parts of the world. Ibn Battuta on his travels in East Africa in 1331 reports that;

“...the *qadi*, the *wazirs*, the private secretary, and four of the leading *amirs* sit for hearing litigation between the members of the public and hearing the cases of people with complaints. In a matter connected with the rules of the *sharia* (religious law) the *qadi* passes judgement; in a matter other than that, the members of the council pass judgement, that is the ministers and the *amirs*”²⁷⁸.

In all plural-legal systems, the courts take cognisance of the close political, socio-economic, cultural and even sentimental ties which bind one state unit to the other. Thus, the courts are more disposed to take account of the law of a sister-state unit and “to seek the harmonisation and mutual accommodation of conflicting state policies”²⁷⁹.

There is the need for legal units to be receptive to each other's laws. Hence the guiding principles for the court are far more flexible than those that operate between legally unified states.

²⁷⁸ Said Hamdun & Noel King; *Ibn Battuta in Black Africa*, 1975 at p.18. Commenting on this practice the authors observe that

“The difference between the cases decided by the *qadi* and those decided by the group may have been the difference between the law of the *sharia* which was known to the *qadi* as an expert who had to set out what the law said, and traditional law where a group of old men who knew many cases and precedents would give a verdict on behalf of customary law”. At p. 65.

²⁷⁹ Shapira, Amos; *The Interest Approach to Choice of Law*, 1970, Also see Cavers; *The Choice of Law Process*, 1965, Preface at p. Viii - “A spirit of mutual accommodation leading to agreement on certain principles may spread more quickly through the

Furthermore, while the choice of law process on the international level often involves a choice between radically divergent legal systems or rules, the inherent closeness and relative homogeneity among the state units of a plural-legal state provide a common ground for comity within an atmosphere and framework which are commonly accepted as notions of reason and justice. Thus, the conflict situations between the various legal systems are much less pronounced than those which exist between legally unified states on the international level.

This cultural homogeneity and common notion of justice has certain consequences for choice of law in plural-legal systems. For, the *forum* of one state unit is usually not reluctant to adjudicate a case governed by the law of a sister-state unit. However, there is a slight difference between choice of law in plural-legal states and some federal states such as the United States of America. Several views on inter-federal choice of law rules have enjoyed their popularity in America. Although the common law is largely a unifying legal factor, there have been arguments in America as to the status of the law of another state.

Currie, one of the most prominent lawyers in this area of law thought that the court should examine the policies and interests expressed in the substantive rules to determine whether there is a 'true' or 'false' conflict. There is a true conflict where the rules, policies and interests are found to be in conflict, in which case the law of the forum should be applied, even though the other state also has an interest to see the application of its own policy²⁸⁰. The interest approach appears to ignore the international nature of the conflict of laws but even in a federal inter-state situation, it is difficult for a court to determine what the policy behind a piece of legislation is. Not surprisingly, the interest approach has been applied in America only to inter-state cases²⁸¹, and is unsuitable for international cases, and one would add, to plural-legal states as well.

American courts now rely on two fairly similar principles, the first, found in the American

states of a federal union than among independent nations".

²⁸⁰ Currie, B; *Selected Essays on Conflict of Laws*, 1963, Chapters 4 and 12.

²⁸¹ Kegel, G; "Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reforms", (1979) 27 *Am. J. Comp. Law*, p. 618.

Law Institute's Restatement of the Conflict of Laws, Second (1971), which adopts, as a basic rule, the law of the state which has the most significant relationship to the issue at hand. In paragraph 6 the Restatement requires the court to follow the statutory requirements of its own state but in the absence of such requirements, the factors relevant to the choice of the applicable law include;

- (a) the needs of the interstate and the international system,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relevant interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

The most significant relationship test, as it is sometimes called, has been widely applied in America but it is not suitable for plural-legal states in Africa. "They read like an exhortation to a law reformer, as criteria to be weighed in formulating new rules"²⁸² and not concrete rules the court might rely on.

The second approach is provided by Leflar who advocates that the court rely on five choice-influencing considerations²⁸³, which he arranges in no order of priority;

- (A) Predictability of results;
- (B) Maintenance of interstate and international order;
- (C) Simplification of the judicial task;
- (D) Advancement of the forum's government interests;
- (E) Application of the better rule of law.

²⁸² Cheshire and North's *Private International Law*, 13th Edition, 1999, p.30.

²⁸³ Leflar, R. A; *American Conflicts Law*, 4th Edition, 1986, pp. 277 –278.

However, four of his principles are to be found in the Restatement Second, leaving only the last as relevant; (E) Application of the better rule of law to be considered. The “better rule of law” approach is unsuitable for plural-legal situations as it might lead to the court concluding that its own rule of law is the better rule of law²⁸⁴.

The cultural homogeneity in plural-legal systems leads to the situation where the doctrine of *forum non conveniens* is hardly ever applied except in rare cases. One of those rare occasions occurred in *Rockware Glass Ltd v MacShannon*²⁸⁵. In that case the House of Lords was satisfied that the other forum, Scotland, would be clearly or distinctly more appropriate than the English forum. Both parties were resident in Scotland and all elements of the dispute took place in Scotland but the plaintiffs, upon legal advice, honestly believed that they would obtain certain advantages if the case was tried in England. To determine a clearly more appropriate forum abroad, the forum must be one with which the action has the most real and substantial connection²⁸⁶, which will include, not only factors affecting convenience or expense, such as availability of witnesses, but also the law governing the relevant transaction and the place where the parties respectively reside or carry on business. All these elements were considered in the *Rockware Glass* case and were found to be present;

Four appeals were consolidated. They all involved Scotsmen living and working in Scotland who suffered industrial injuries in Scotland. All the defendants were English companies with registered offices in England. All the witnesses, medical and otherwise, lived in Scotland. The plaintiffs served writs on defendants at their English registered offices, the English courts thus having jurisdiction. The defendants sought to have the English proceedings stayed, leaving the plaintiffs to bring the claims in Scotland²⁸⁷.

The House of Lords held that the appropriate or natural forum for the trial was in Scotland,

²⁸⁴ See for example, *Clark v Clark*, 222, A 2nd. 205 (1966).

²⁸⁵ [1978] AC 795.

²⁸⁶ *Spiliada Maritime Corpn. v Cansulex Ltd.* [1987] AC 460, at pp. 477 – 478.

²⁸⁷ *Rockware Glass v MacShannon* [1978] AC 795.

as all significant factors pointed to that part of the United Kingdom and that there was no justification for the plaintiffs coming to England. Apart from clear cases, such as the *Rockware Glass* case, *forum non conveniens* is not normally applied to cases in plural-legal states except in intra-federal states, as in the United States.

Secondly, the socio-economic and cultural homogeneity within countries with several legal systems often has the psychological effect of minimising the "foreign" aspect of choice of law²⁸⁸. The court therefore easily presumes the reasonable expectations of the parties at the relevant time of the transaction or occurrence²⁸⁹. The reasonable expectation is not the same as the American interest theory but the expectation that justice will be done.

Thirdly, choice of law problems facing the court in a plural-legal system appear to be often less complicated than in international conflicts. Perhaps this is because of the proximity of the legal districts thus making the "foreign law" more easily ascertainable and the possibility of error in stating the applicable "foreign" law is greatly reduced.

Despite the relatively congenial atmosphere in which inter-local conflict of laws operates, the choice of law problems are far more recurrent than on the international level. The main reason for this is the ease of mobility within the state units. Further, the nature of the conflicts also tends to differ.

Due to the greater frequency of inter-local choice of law issues, inter-local choice of law processes appear to be less sophisticated and relatively simple to apply, except in the United States of America where they are more elaborate. Possibly the reason is that a quick solution is needed in these cases as they have immediate impact on the community.

Lastly, because the decisions of a court in an inter-local conflicts case are bound to have a

²⁸⁸ Cheatham & Rees; "Choice of the Applicable Law", 52 *Columb. L. Rev.* (1962), pp. 95-962. In the United States, "...business and social activities almost ignore state lines."

²⁸⁹ Anderson, J. N; "Colonial Law in Tropical Africa: the Conflict between English, Islamic and Customary Law". 35 *Indian Law Journal*, 1959 – 60, p. 440.

substantial impact on the community, the local court is more likely to be guided by a sense of justice and fair play than a court sitting in an international conflict case. Choice of law in Africa follows this pattern²⁹⁰.

II. A Note on Choice of Law in Pre-colonial Africa

There is very little literature on choice of law in pre-colonial Africa. However, there are glimpses into the past through the observations of European and Arab travellers and present-day remnants of the old legal systems.

Choice of law situations arose mainly because of the constant movement of people from one African state unit to the other. Most of the "strangers", as they are still referred to in Africa today, lived in permanent communities²⁹¹, some of which became even larger than the host town. Permanent stranger communities have been known to exist since very early times and have been reported in ancient Ghana²⁹². In the coastal regions, Dutch travellers have reported the presence of settlements of merchant communities from the neighbouring interior²⁹³. The usual pattern was that the "foreign" Africans lived in a special ward within the town under their own chief. These settlements were sometimes called "Zongo" and continue to exist in Africa to this day²⁹⁴.

Where the stranger community was fairly large, they were allocated land outside the host town, where they built their own village or town. Territory allocated to strangers sometimes became transformed into large towns, the most famous example being Timbuktu. Timbuktu

²⁹⁰ See Anderson, J. N; "Colonial Law in Tropical Africa: Conflict between English, Islamic and Customary Law", 35 *Indian Law Journal* 1959-60, p. 440.

²⁹¹ See a valuable article on the subject by Elliot P. Skinner; "Strangers in West African Societies", in *Africa*, Vol.XXX111, No. 4, October 1963, p.565, on which the above paragraphs are based.

²⁹² Stranger communities were found in Melle, Gao (the capital), Djene and Timbuktu. See Ibn Battuta; *Travels in Asia and Africa* 1325-1354 AD, pp. 124 - 125.

²⁹³ Pieter de Marees; *A description and Historical Declaration of the Golden Kingdom of Guinea, Otherwise called the Golden Coast of Myna*, 1602 (modern Ghana), p. 108.

²⁹⁴ Anderson describes "Zongo" as "Suburbs or quarters occupied by immigrants". Anderson, J. N; *Islamic Law in Africa*, 1970, p. 270.

was the commercial stranger town where Islamic commercial law applied but which was dependent on Gao, the imperial capital. The twin-city system has survived in modern Ghana, as in the examples of Salaga - Kpembe or Gambaga - Narelingu²⁹⁵. Whether the stranger community lived within the host town or built their own, they lived under their own chief or headman and enforced their own laws. However, since strangers were usually engaged in local and foreign trade, it was most likely, that Islamic commercial law applied to transactions, after that legal system arrived in Africa. The practice of separate jurisdiction for strangers was observed by the Arab historian Sa'di in Timbuktu in 1352:-

"Timbuktu at that time was inhabited by people of Minah and Tawarek, especially Musafa, who had a headman of their own, while the Melle Governor was Farba Musa"²⁹⁶.

Whenever the need arose, the headman or chief represented the settler community at the local court explaining matters of law of his community. Where the stranger community was very small, the local chief appointed one of his own officials to deal with the settlers as intermediary. It was the function of this official to collect the relevant law on any subject to be presented in a case involving a stranger and a local²⁹⁷.

It is not clear how the question of choice of law was approached but there are indications of a form of *depeçage*²⁹⁸ as the guiding principle. Thus, Elias observes that an Alkali in Northern Nigeria or a Liwali in Tanganyika, who sits in judgment over disputes between a believer and a non-believer, sometimes applies, Islamic law of one school or another, sometimes a mixture of it with elements of purely indigenous customary law²⁹⁹. This care to achieve the fairest possible result is a hallmark of inter-local conflict of laws, as discussed earlier. It is this subtleness of the choice of law process which leads commentators to the

²⁹⁵ Cambridge History of Africa, Vol. 2. c. 55BC - AD 1050, p. 668.

²⁹⁶ Sa'di Abderrahman Ben Abdallah Ben Imram Ben Amires - *Tarikh es Soudan*. Translated by Houdas, O; 1900, p. 36.

²⁹⁷ Skinne; "Strangers in West African Societies", *Africa, Vol xxxiii, No. 4, 1963*, p. 565.

²⁹⁸ *Depeçage* is a choice of law technique which judges apply sometimes apply to pick and choose from legal rules from different system.

²⁹⁹ Elias, T. O; *British Colonial Law*, 1962, p. 222.

wrong conclusion that African courts are unaware of choice of law. Elias himself concludes that where there is a conflict between two local legal systems, the judges are "...blissfully unaware of the problems of choice of law"³⁰⁰. The court is guided solely by the wish to resolve the problem and "...resorts to an appeal to natural justice and sweet reasonableness - a mixture of *jus gentium* and *jus naturale*". This "sweet reasonableness" in picking and choosing between the laws of different legal systems, or *depeçage*, is a recognised choice of law process and not proof of its absence. The close proximity of the various state units demands that a choice of law process be applied which would not create animosity. Thus, Gluckman observes that the "reasonable man" standard is applied³⁰¹. The "reasonable man" is not the abstract personification by the English judge of the man on the Clapham omnibus or a conceptual device modelled by the judge to measure judicial standards but rather the reasonable expectations of the parties and proper behaviour, or as Anderson puts it "... a solution based on legal principles, but with a flexibility of adjustment designed to preserve the social equilibrium and satisfy both the parties and the public"³⁰².

III. The Law Applicable to European Settlers in Pre-colonial Africa

With the arrival of Europeans in the fifteenth century, a new element entered the choice of law process in Africa. The cosy method of picking and choosing between the various legal systems could not apply to Europeans, if only because African judges had no way of ascertaining the laws of European countries. What appears to be the case is that how far European laws were allowed to apply depended on the level of friendship or hostility between the European community and its African hosts.

The main areas of contact between Africans and Europeans were on the coasts of Upper Guinea (from Sénégal to Cape Mount in Liberia), the Gold Coast and the Western Slave Coast (roughly between the Volta River in Eastern Ghana and Lagos in Nigeria).

³⁰⁰ *ibid*, at p. 222.

³⁰¹ Gluckman, M; *Ideas and Procedures in African Customary Law*, 1969, p. 74

³⁰² Anderson, J. N; "Colonial Law in Tropical Africa: the Conflict between English, Islamic and Customary Law"; *35 Indian Law Journal*, 1959 – 60, p. 440.

Information so far available covers only the Upper Guinea Coast³⁰³.

IV. The Upper Guinea Coast, c. 1441 - c.1800

The earliest records on the law applicable to Europeans were provided mainly by the Portuguese, who arrived in the area in 1441 and set about establishing trading settlements. These settlements were not manned permanently but were meeting places, where the Portuguese exchanged their goods with their middlemen³⁰⁴. These middlemen were mainly Europeans who acted for both Africans and Europeans and were usually Portuguese. There were two types of middlemen, the *lançado* and the *tangomao*³⁰⁵. The *lançado* (from the Portuguese "to throw"), were Europeans who had "thrown themselves" among Africans, living and trading among them but who retained their identity as Europeans. The *tangomao*, on the other hand, was the European trader who severed all his links with Europe, adopting the local religion and custom and sometimes covered himself in ritual tattoos³⁰⁶. It is the reports of these two groups of settlers, which give some insight into the law applicable to Europeans in pre-colonial West Africa.

The general pattern which emerges is that societies of the Upper Guinea Coast applied a strict territoriality rule to Europeans. While the *tangomao* regarded himself as a local and therefore subject to local law, the *lançado* saw himself as a foreigner and expected the law of his nationality to apply to him in his personal matters. Nevertheless "the *lançado* was asked to fit into the African way of life"³⁰⁷ and all local laws and customs applied to him equally. Rodney cites one example which illustrates the point. The law of succession in some parts of the region stipulated that movables passed to the king and not to the next of kin³⁰⁸. This law applied equally to the *lançado*, although as a trader, he was likely to be in

³⁰³ Walter Rodney; *History of the Upper Guinea Coast 1545 – 1800*, 1970, pp. 20 – 21.
Hereafter referred to as Rodney.

³⁰⁴ Rodney, p. 19.

³⁰⁵ *ibid*, at p. 74.

³⁰⁶ *ibid*, at p. 74

³⁰⁷ *ibid*, at p. 86.

³⁰⁸ *ibid*, at p. 87.

possession of goods belonging to a third party³⁰⁹. Even salvage laws appeared to follow the same pattern. Thus, if a ship ran aground in the king's territory, both the ship and its contents passed to the king³¹⁰. This is an extreme example of the territoriality theory but with an important difference. The *lançado* (indeed any foreigner), could also start litigation against an African and expect to be treated equally³¹¹.

The territoriality rule applied to contracts as well. A contract between a *lançado* and an African was unwritten, in the usual African manner, and depended heavily on oaths which were binding in the form in which the contract was entered into. Thus, only the *lex loci contractus* was applicable³¹². There is some evidence that experienced *lançado* began to lure African parties to the contract into kingdoms with more advanced court systems or whose oaths were more widely applicable, in order to have the benefit of a more favourable law³¹³. This is an early example of forum shopping which is today a feature of international conflict of laws.

There must have been a few towns which came to specialise in commercial law. Rodney reports that by the beginning of the seventeenth century, the town of Cacheu (in modern Gambia), had a population of about 1,500, of which 500 were permanent European residents³¹⁴. It is reasonable to assume that a town with such a large permanent foreign population, would apply more sophistication and sensitivity to the territoriality principle than would a provincial village court.

These early encounters between West Africans and Europeans may have laid the foundation for the ready recognition by the colonial powers of African legal systems in colonial West Africa.

³⁰⁹ *ibid*, at p. 87.

³¹⁰ Brasio; *Voyages from Santiago to Guinea*, [Second Series (ii)] 1558, p. 467.

³¹¹ Rodney, p. 87.

³¹² *ibid*, at p. 88.

³¹³ *ibid*, at p. 92.

CHAPTER FIVE

CHOICE OF LAW IN FRENCH-SPEAKING SUB-SAHARAN AFRICA

A. Historical Background

Permanent French settlement in Sub-Saharan Africa began in 1638 when French traders erected a settlement near the mouth of the *Sénégal* river but the site proved to be unhealthy and they moved upstream to the island of Guet N'Dar and built what was to be called Saint-Louis³¹⁵. The French Government later purchased the offshore island of Gorée from the Dutch in 1678

and Gorée became the French base for trade with the Petit-côte (Rufisque, Potudal and Joal)³¹⁶.

The background of French involvement, as far as law is concerned, began in 1814. The fall of Napoleon and the Treaty of Paris reduced French possessions in Africa to Saint-Louis and Gorée, both in present-day Sénégal³¹⁷. Between 1839 and 1844, further settlements were established in Ivory Coast and Gabon. From these settlements the French expanded into the interior. By the second half of the nineteenth century, France had become the dominant power in West Africa, with the British holding on to only four colonies, Gambia, Sierra Leone, Gold Coast (Ghana), and Nigeria. Between 1895 and 1904, a series of decrees were issued grouping all French possessions in West Africa into a large federation, *Afrique Occidentale Française* (OAF). In similar fashion the French expanded from Gabon into Central Africa and by 1910, created a second federation, *Afrique Équatoriale Française* (AEF)³¹⁸.

³¹⁴ *ibid*, at p. 92.

³¹⁵ Hargreaves, J. D; *France and West Africa*, 1969, p. 34.

³¹⁶ *ibid*, at p. 34.

³¹⁷ Salacuse, J; *An Introduction to Law in French-speaking Africa*, 1969, Vol.1, p. 9. Hereafter cited as Salacuse.

When France declared its colonies in Africa, the assimilation of the African colonies was its principal aim. The theory expected the administration and legal model of the French executive to be followed in all cases³¹⁹. "As far as law is concerned it meant that native custom had to give way to the Code Napoleone"³²⁰. Officially, assimilation was in the Isaac Report to the Congress of 1889 as;

"that system which tends to efface all difference between the colonies and the motherland, and which views the colonies simply as a prolongation of the mother country"³²¹.

Another feature of the civil law which was transported to Africa is its centralised nature. Civil law systems were evolved by strong centralised governments, while the common law in England is the result of judicial procedure which never came under the direct control of the monarch. Civil law courts, on the other hand, lacking the doctrine of *stare decisis* could only turn to Roman Law for guidance³²². And yet Roman Law had fallen under the absolute control of the Roman Catholic Church, which interpreted the law for its own protection, rather than for the protection of the individual. Roman Law became "...a prop for absolutism and feudalism"³²³.

The French revolution of 1789 changed all that. "Unlike the common law, whose development has been gradual and (at least up to the present) continuous, the Civil Code is the product of the age of rationalism and enlightenment"³²⁴.

The Civil Code is a systematic and authoritative piece of legislation aimed at unifying the state under one and the same law. There is a strong emphasis on logical integration, which

³¹⁸ Salacuse, p. 10.

³¹⁹ Hooker, M. B; *Legal Pluralism, An introduction to Colonial and neo-colonial laws*, 1975, p.196. Hereafter cited as Hooker.

³²⁰ *ibid*, at p. 196.

³²¹ *ibid*, at p. 196

³²² *ibid*, at p. 193.

³²³ *ibid*, at p. 193.

³²⁴ Hooker, p. 193.

was to have serious implications in French colonies of Africa. This rationalism has led to the inevitable division of the civil law systems into "private" and "public" law³²⁵. Private law - which deals with status and transactions between persons - is administered by the ordinary courts, while public law - which relates to the validity of administrative and state acts - is adjudicated by special administrative courts³²⁶. The effect of this division on the colonies was profound. It meant that the wholesale application of civil law to a colony was not a judicial matter but an administrative one, and therefore subject to bureaucratic decision-making³²⁷. Since bureaucratic decisions are usually the result of political policy, French colonial law changed with each successive government.

II. French Colonial Policy

Due to the fact that French colonial policy was a matter for the executive, there had never been a coherent colonial policy. Officially, the French recognised four theories of colonisation - subjection, autonomy, assimilation and association³²⁸. Variations of each of these theories went in and out of official favour as often as the turbulent political history of France dictated.

Subjection was the theory which stipulated that the colony was to be ruled by France for French interests exclusively. The colonial administration was to be tightly controlled and the view that the interests of the colonial subjects could be taken into account was denied. Such harsh colonial policy was never truly implemented but it does demonstrate the civil law concept of the supremacy of state power.

Autonomy was the theory whereby the colonial subjects would be allowed to govern themselves according to French law. Though recognised by the French as a theory, it was

³²⁵ Hooker, p. 193.

³²⁶ *ibid*, at p. 194.

³²⁷ Hooker, p. 193.

³²⁸ Roberts, S. H; *The History of French Colonial Policy, 1870 - 1925*, 1963 (New impression) p. 73. Hereafter referred to as Roberts.

not practised until after the Second World War³²⁹.

Assimilation was by far the most popular theory and was officially defined as "...that system which tends to efface all difference between the colonies and the motherland, and which views the colonies simply as a prolongation of the mother country beyond the seas"³³⁰. According to this theory, the legal model of France was to be strictly followed in all the colonies. As far as law was concerned, it meant that local law had to give way to the French Code. On the whole, assimilation as a policy was a failure and was never fully implemented in any colony³³¹.

Association became a fashionable theory by the end of the nineteenth century. This theory held that although the colony was to be administered for the benefit of France, the latter had a duty to the colonial people, to develop their institutions and protect their well-being³³². Thus, the theory recognised two parallel approaches to development, colonial and metropolitan, a major improvement on assimilation. Slowly colonial officials began to accept that local legal rules were enforceable³³³. This development led to great advances in local government and in the development of local legal systems in French colonial Africa but it was still nowhere near the levels achieved in British colonies through indirect rule³³⁴.

In spite of these developments, however, French colonial policy, on the whole, continued to depend on French national interests. Thus, the centralised authority of Paris remained dominant despite association³³⁵. Secondly, any policy adopted for a particular colony, formed part of French state policy and was subordinate to the requirements of that state policy. Association was not implemented in disregard of the national interest of France. The view was that:

³²⁹ Salacuse, p. 16.

³³⁰ *ibid*, at p. 67.

³³¹ *ibid*, at p. 67.

³³² Sarraut, A; *La mise en valeur des colonies françaises*, 1923, p. 87.

³³³ Nevertheless, the recognition of local legal systems took place only in West Africa and Tonkin. The French Code remained supreme in Central Africa, Algeria and Cochin-China.

³³⁴ Roberts, pp. 73 - 74, 76 - 77

"The administration of native customary law is a branch of native policy and territorial administration. The tribunal is an observation post from which the administrative officer who presides over it may study the effects of his own administration and the reaction of the people he governs....And in pronouncing judgment he effects political action; he maintains civil peace as well as public order; he recognises and observes native rights and by pursuing justice he stimulates their evolution."³³⁶

Thus, French colonial law was based on three essential features; law is a branch of native policy; its administration is a political matter; and the local legal system must be stimulated to evolve towards higher standards of (French) civilisation. In truth therefore, association was assimilation at a slower pace:

"The colonial peoples were to absorb French culture so that they might become Frenchmen and French citizens; the colonies were to become overseas parts of France".³³⁷

As Laverue observes, the policy of assimilation, tempered with varying degrees of concession, was not practicable due to the diverse nature of the races of which the French colonial empire was composed. Thus, French colonial policy had to be adapted to suit practically every colony:-

"La pratique coloniale suivie par nous depuis 1871 représente une infinité de dosages différentes des deux principes d'autonomie et d'assimilation; ces dosages ont varié non seulement d'une colonie à l'autre, mais au cours du temps en ce qui concerne la même territoire."³³⁸

³³⁵ *ibid*, at p. 77.

³³⁶ Delavignette; *Freedom and Authority in French West Africa*, 1968, p. 85.

³³⁷ Robinson, K. E; "The Public Law of Overseas France since the War", 32 *Journal of Comparative Legislation and International Law*, 1950, p. 37.

³³⁸ Laverue, B; *Une révolution dans la politique coloniale de la France*, 1948, p. 60.

Association therefore, was in reality, assimilation with doses of other policies which were regarded as suitable for each colony.

III. Historical Developments in France and their Impact on Law in the Colonies.

(a) *The Restoration (1815 - 1830)*

Throughout the colonial period, France adhered to the principle of centralised authority but the institutions which exercised legislative power over the colonies changed with each constitution and era. The Charter of 4 June 1814, which restored the monarchy, provided that "the colonies are to be governed by particular laws and regulations".³³⁹ However, it did not specify the areas to be covered by each type of legislation. It is possible that "regulations" (règlements), referred to royal ordinances, for during the entire Restoration period, the only source of colonial legislation was the ordinance. Parliament never enacted a law for the colonies³⁴⁰.

(b) *The July Monarchy (1830 - 1848)*

The Charter of 14 August 1830, under the July Monarchy, simply stated that "the colonies will be governed by particular laws".³⁴¹

The omission of "regulation" would seem to imply that the king could no longer legislate by royal ordinances. The situation was soon reversed however, by the law of 24 April 1833, which provided that "...the French establishments...in Africa...will continue to be governed by ordinances of the King"³⁴².

(c) *The Constitution of 4 November 1848 (1848 - 1852)*

The Constitution of 1848 appeared to have abandoned special legislation for the colonies,

³³⁹ Art. 73. Bulletin des lois (5th. Ser.) Vol. I, p.197

³⁴⁰ 1 Dareste; *Traité de Droit colonial* 1931, p. 230.

³⁴¹ Art.64 [1830], *Bulletin des lois* (9th Ser.), Part I, p. 51.

³⁴² Art. 25, 1833 Bulletin des Lois (9th Ser.), Part I, p. 117.

for it provided that:-

"The territory of Algeria and of the colonies is declared French territory and will be governed by particular laws until a special law places them under the regime of the present constitution³⁴³."

However no such special law was ever enacted and during the lifetime of this constitution, Colonial legislation consisted entirely of decrees of the head of state, who had acquired the powers granted the king by the law of 24 April 1833³⁴⁴.

(d) *The Second Empire*

The constitution of 1852 which ushered in the Second Empire, directed the Senate to establish a constitution for the colonies³⁴⁵. Two years later, the Senate passed the *Senatus - Consulte* of 3 May 1854 which was to form the basis of legislation for the African colonies. As originally enacted, the *Senatus - Consulte* gave the Emperor exclusive power to rule the African colonies by decree until a new *Senatus - Consulte* was enacted³⁴⁶. No new *Senatus - Consulte* was ever enacted and so throughout the Second Empire, legislation affecting Africa consisted entirely of imperial decrees³⁴⁷.

(e) *The Third Republic (1870 - 1946)*

With the Third Republic, Parliament regained its full legislative powers over the colonies but did not repeal the 1854 *Senatus - Consulte*³⁴⁸. The result was that while Parliament could pass laws on any matter concerning the colonies, the head of state was only able to legislate by decree on matters which Parliament failed to address. The boundaries of the legislative competence of the two organs of government were not always clear and in the

³⁴³ Art.109 [1848] Bulletin des Lois (10th Ser.) Part II. p. 575.

³⁴⁴ Salacuse, pp.14 – 15.

³⁴⁵ Art. 27 [1852] Bulletin des Lois (10th Ser.) Vol.1X, p. 59.

³⁴⁶ Art. 18 [1854] Bulletin des Lois (11th.Ser.) Vol. X, p.1159.

³⁴⁷ Salacuse, p.15.

³⁴⁸ *Senatus-Consulte* of 21 May 1870, Art.43 [1870] Bulletin des Lois, (11th.Ser.) Part 1, p. 519.

end, the head of state became the principal source of legislation for the colonies³⁴⁹.

(f) *The French Union (1946 - 1958)*

The French Constitution of 27 October 1946 created the French Union and transformed the French colonies into "territoires d'outre-mer"³⁵⁰. There was very little legal significance to this change except that it provided that only Parliament could legislate for overseas territories in the areas of criminal law, civil liberties and in administrative matters³⁵¹. The President still had the power to legislate by decree on matters not reserved for Parliament or upon which Parliament omitted to legislate.

(g) *The French Community and Independence*

When De Gaulle came to power in 1958, he proposed to transform French overseas territories into autonomous republics within the French Community. The matter was put to a referendum in all the colonies and all, except Guinea, endorsed it. Because of her refusal, Guinea was granted her independence on 1 October 1958 and ceased to be subject to French law³⁵².

Under the French Constitution of 1958, the Overseas Territories of France were given the opportunity of becoming members of the French Community³⁵³. The Constitution also provided that the French Community, and not the member states, possessed jurisdiction over foreign policy, defence, economic and financial policy, currency, policy on strategic raw materials³⁵⁴ and unless excluded by agreement, higher education, internal and external

³⁴⁹ Salacuse, p.15.

³⁵⁰ Overseas Territories.

³⁵¹ Article 72, French Constitution of 27 October 1946.

³⁵² Salacuse, p. 16.

³⁵³ Articles 76 and 86, *Constitution Française*, adopted by referendum on 28 September 1958 and promulgated on 4 October 1958.

³⁵⁴ Article 78 provided, *inter alia*, "The Community's jurisdiction shall extend over foreign policy, defence, currency, common economic and financial policy, as well as over policy on strategic raw materials..."

communication and supervision of the courts³⁵⁵. All French African territories, except Algeria obtained their independence in 1960³⁵⁶.

IV. Reception of French Law

Except in the case of Sénégal, French Law was introduced into African colonies in two ways;

- (i) the enactment of a reception statute which introduced a whole range of laws into one or both federations, AOF and AEF.
- (ii) the enactment of specific legislation for the colony.

The reception statute was enacted in general terms without actually citing the specific laws being introduced but providing that the laws of one of the colonies of the federation, applied to another. The only exception was Sénégal, which, as the first African colony, already had legislation in place³⁵⁷. This Sénégalaise legislation was now incorporated into reception statutes and introduced into the other colonies. An example is the decree of 11 May 1892 establishing the courts of French Guinea:-

"In any matter, the courts of French Guinea shall conform to the civil, commercial and criminal legislation of Sénégal, insofar as it is not contrary to the present decree"³⁵⁸.

Similar decrees introduced the civil, commercial and criminal law of Sénégal into Dahomey and Ivory Coast³⁵⁹.

The practice remained the same for Equatorial Africa, where the civil, commercial and

³⁵⁵ Art. 78, French Constitution of 1958.

³⁵⁶ Salacuse, p. 17.

³⁵⁷ Salacuse, p. 22.

³⁵⁸ Art. 23, 2 Penant (1892), p. 519.

³⁵⁹ For Dahomey, Art. 23, 3 Penant (1894) p. 454; for Ivory Coast Art.23, 6 Penant III (1897), p. 17.

criminal law of Sénégal was introduced by the decree of March 1903³⁶⁰.

V. The Position of Local Legal Systems

In West Africa, French colonial policy did not suppress local legal systems in spite of the policy of assimilation. Thus, the greater part of the received metropolitan law did not apply to the bulk of the population. This is in contrast to earlier attempts in Sénégal to subject the entire population to French Law. An order of 5 November 1830, which introduced the Civil Code, stated that:

"Any individual born free and inhabiting Sénégal or its dependencies will enjoy in the colony, the rights accorded by the Civil Code to French Citizens"³⁶¹.

What brought about the change appears to be the court decision in *Diallo c. Diallo*³⁶². In that case the Court of Appeal for West Africa held that although French Law applied to all Sénégalaise, it did not apply to persons whose local law was preserved by legislation. If the court had not intervened in this way, the result could have been the granting of French civil liberties and probably citizenship to all Sénégalaise.

Regarding the application of local legal systems, France had no option but to recognise and enforce existing local laws, especially in matters of land, family and succession. The African principles upon which these areas of law were based, were so fundamentally different from those of the French, that any forced imposition of French civil law, would have had disastrous consequences. In the words of Solus:-

"The truth is that the merit of any legislation is essentially relative. The best law is the one which corresponds best to the political and social state, to the economic needs, to the religion and to the mores of the people whose legal relations it must

³⁶⁰ 12 Penant III (1903), p. 118.

³⁶¹ 1830 Bulletin Administratif du Sénégal, p. 303.

govern"³⁶³.

Nevertheless, French judges were at first reluctant to recognise that local legal systems could develop and grow and tended to insist that local legal rules were "...immemorial rules born of practice followed uninterruptedly in a given group"³⁶⁴.

As regards Islamic Law, French experiences in Algeria, which they had annexed and settled, were such that they expected only hostility from West African Moslems. And yet, the hostility shown by the Algerians was due mainly to the fact that the French had annexed their country³⁶⁵. Islam, being the dominant religion, merely served as a rallying point to resist the French³⁶⁶. The situation in West Africa was different. Nevertheless, the French saw themselves as "...waging a crusade to liberate indigenous Africa from the grasp of militant Islam"³⁶⁷. Attempts were made to organise non-Islamic indigenous institutions to combat Islam, to strengthen the power base of the chiefs, to codify the principal local legal systems, to educate the sons of the chiefs in their own "customary law" on the same basis as the Moslems did³⁶⁸.

With time the French came to realise that much of the Islamic Law practised in their colonies was part of the Maliki school and largely in name only. At the time Islamic Law was brought to Africa, the indigenous legal systems were well established and in many cases, directly contradictory to Islamic principles. "In accepting Islam, the people did not, indeed could not give up immediately and completely, law and custom which affected their way of life"³⁶⁹. The interaction between Islamic Law and indigenous law led rather to the modification of Islamic Law. In the words of Dicottignies:-

³⁶² Cour d'Appel d'AOF. 13 mai 1927.

³⁶³ Solus; *Traité de la condition des indigènes en Droit privé*, 1927, p. 233.

³⁶⁴ *Femme Koromaka c. Le mari Kamara*, Cour d'Appel d'AOF, 13 novembre, 1924, 34 Penant I (1925) p. 101.

³⁶⁵ The Cambridge History of Africa, Vol. 3, c.1790 - c.1870, p. 108.

³⁶⁶ The Cambridge History of Africa, Volume 5, c. 1790 - c.1870, pp.109 – 110.

³⁶⁷ Anderson, J. N; *Islamic Law in Africa*, 1970, Lord Hailey's introduction at p. ix.

³⁶⁸ *ibid*, at p. ix.

"...the customary law of the Sénégalaise people has resisted more than one invasion in the course of its history. If the country has been Islamised, at least in partial fashion, this Islamisation has been more religious than juridical"³⁷⁰.

The French finally accepted that in West Africa, there was a distinction between Islam in theory and in practice. In 1857, a decree was published recognising the right of Sénégalaise Moslems to be governed by Islamic Law. The decree established a Moslem court to hear "...matters between Moslems, involving civil status, marriage, succession, gifts and wills...according to the law in force among the Moslems"³⁷¹.

In 1932, the French authorities followed with a decree which provided that where Islamic Law had been modified by indigenous law, the modified law was to be enforced by the courts³⁷². However, although the French did not interfere with the process of local law modifying Islamic Law, they sometimes modified the local rules which they found repugnant. Thus, for example, the Decree of 15 June 1939 established the minimum age of marriage for females at fourteen and for males at sixteen³⁷³. The Decree also provided that a marriage was not valid unless both parties consented to it³⁷⁴.

VI. Persons to Whom Local Law Applied

Prior to 1946, a distinction was drawn between those who were subject to "customary status" (*statut coutumier*) and those subject to "French status" (*statut civil français*). Only French citizens were entitled to French civil status except for Africans resident in the four "communes" of Sénégal (Dakar, Gorée, Rufisque and Saint-Louis)³⁷⁵. However, the

³⁶⁹ Salacuse, p. 47.

³⁷⁰ Dicottignies; *L'Apport européen dans l'élaboration du Droit Privé sénégalais*, 1964, p. 79, at p. 83.

³⁷¹ Decree of 20 May 1857, Art.2 [1857] Bulletin des Lois (11th Ser.) Part 2, p. 878.

³⁷² Decree of 20 November 1932, Art. 6. 42 Penant III (1933), p. 161.

³⁷³ 49 Penant III (1940), p. 110.

³⁷⁴ Salacuse, pp. 48 – 49.

³⁷⁵ Article 82 of the French Constitution of 1946 stated that; "Citizens who do not have French civil status retain their personal status, insofar as they have not renounced it". Translation in Salacuse, p. 53.

Africans of the four communes were also subject to the local legal system at the same time in their personal matters such as marriage and succession³⁷⁶.

The French Constitution of 1946 extended French citizenship to all French subjects in overseas territories³⁷⁷ but at the same time, Article 82 of the Constitution provided that personal status was still subject to the local legal system and not to French civil law³⁷⁸. In 1955, the Conseil d'État ruled that a French subject could irrevocably and permanently renounce the application of local law to himself after reaching the age of 21 and if he was not a party to a polygamous marriage by a simple procedure of a declaration before a competent court of law³⁷⁹. However, the declaration was binding only on the individual and did not affect his family, although a father could include his minor children in his declaration³⁸⁰.

VII. Matters Governed by Local Legal Systems

Except for the "Quatre Communes" of Sénégal, all general matters of private law were governed by local law³⁸¹. In one area however, problems arose. The Decree of 20 July 1900 (concerning Sénégal and Ivory Coast), provided that "...property belonging to natives is governed by local customs and usages in all that concerns its acquisition, retention and transfer"³⁸². But at the same time, French concepts of land ownership were introduced and the civil law distinction of public and private ownership came to apply to land. Publicly owned land referred to public roads, waterways etc, while "private land" covered grants made to individuals. Private land also included land purchased by persons subject to *statut français* from holders subject to the local law³⁸³.

³⁷⁶ *ibid.*

³⁷⁷ Article 80, French Constitution of 1946.

³⁷⁸ *ibid.*

³⁷⁹ Article 82, French Constitution of 1946.

³⁸⁰ Article 82.

³⁸¹ *ibid.*, See also Salacuse, p. 54.

³⁸² Sénégal and Ivory Coast, Decrees of 20 July 1900.

³⁸³ Article 122, Decree of 26 July 1932.

A system of land registration was also introduced which enabled a person subject to local law to legally transfer land to another subject to French status. Once the registration took place, title became indefeasible and irrevocable³⁸⁴. Another controversial procedure introduced was the so-called *constatation de droits foncière des indigènes*³⁸⁵, whereby a person claiming rights to land could have title registered after investigation³⁸⁶. Land so registered was still governed by local law but the holder could only be dispossessed by means of a judicial process,³⁸⁷ presumably before a local customary law tribunal.

French authorities continued to introduce even more complicated legal concepts of land tenure by increasing the legal categories according to which land could be owned. Public land was now referred to as *domaine*, subject to special legislation concerning its acquisition and alienation³⁸⁸. The *domaine* was further divided into two classes, *domaine public* (public state owned) and *domaine privé* which was subject to grant or concessions to private individuals. Although French law never provided that all land was state-owned as a result of colonialism, it did provide however, that "vacant land" and "land without master" belonged to the *domaine privé*³⁸⁹. The decree did not lay down a procedure for determining what was "vacant land".

The situation regarding privately held land was even more perplexing. Four legal categories existed side by side. The first category involved land purchased in the nineteenth century by Europeans and Africans of French civil status from holders who were subject to local legal systems. These holdings were now regarded as governed by French civil law³⁹⁰. Secondly, persons subject to local law sometimes "sold" land to each other, stipulating that the sale

³⁸⁴ *ibid.*

³⁸⁵ "Establishment of the land rights of natives".

³⁸⁶ A.O.F, Decree of 8 October 1925, 35 Penant III (1926), p. 51; A.E.F, Decree of 10 February 1938, 47 Penant III, (1938), p. 192; Togo, Decree of 13 August 1934, 45 Penant III (1936), p. 317; Cameroons, Decree of 21 July 1932, 42 Penant III (1933), p. 33.

³⁸⁷ Provision contained in all Decrees.

³⁸⁸ AEF Decree 28 March 1899, 8 Penant (1899) p.48; AOF Decree of 15 November 1935, 45 Penant (1936), p. 124.

³⁸⁹ Decree of 15 November 1935, 45 Penant (1936), p. 124.

³⁹⁰ Doublier; *La propriété foncière en AOF*, 1957, p. 60. Hereafter cited as as Doublier.

and the land itself was henceforth governed by the French civil code. The validity of these transactions was questionable as West African legal systems often do not permit permanent alienation of land. In most cases, West African land is held collectively by family, village or kinship groups. The individual in possession only holds rights of use and has no transferable title. The courts however, recognised these transactions, often under the pretext that the competing right under local law had not been proved or that it had been extinguished through prescription³⁹¹.

In this way, the French set out to undermine the collective ownership of land in order to stimulate western-type economic development. Their aim was to transform collective ownership into individual ownership and to secure a title which could not be attacked. To achieve this, they introduced the concept of land registration, *le régime de l'immatriculation*, based on the Torrens system of Australia³⁹². Thus, the French succeeded in introducing a system which did not exist in France itself.

The laws governing registration were complex. Generally, all land, whether held under local law or civil law, could be registered but registration was obligatory only when land previously subject to local law, was alienated to a person subject to the civil French status; and in AOF and the Cameroons, where land governed by local law was, for the first time alienated in a contract made in the French form. Once registered, a title became definitive and "constitutes before the French courts, the sole point of departure for rights and charges existing in the real property at the moment of registration, to the exclusion of all other rights not registered..."³⁹³. Furthermore, the land became permanently subject to French civil law and could not revert to its former status, except where a person succeeded to land governed by local law and the deceased owner was also subject to local law³⁹⁴.

However, registered land constituted a very small percentage of each colony and was limited

³⁹¹ Doublier, pp. 60 – 64.

³⁹² AOF Decree of 26 July 1932, 42 Penant III (1933), p. 83; AEF Decree of 28 March 1899, 8 Penant III (1899), p. 53; Togo Decree of 23 December 1922, 32 Penant III (1923), p. 84; Cameroon Decree of 21 July 1932, 42 Penant (1933), p. 40.

³⁹³ Art. 122, Decree of 26 July 1932, 42 Penant III (1933), p. 83.

to urban areas, mainly for housing purposes. Throughout the colonial era, the greater percentage of land remained subject to local law. French attempts to bring most land under French law failed. In 1926 the officials attempted to regulate even land subject to local law and introduced a procedure known as *constatation des droits foncières des indigènes*³⁹⁵. The new law was aimed principally at groups alleging collective property rights. If a member of the group decided to lay claim to a part or whole of the communal land, he must make a request to the local administrator who would conduct an inquiry. If the claim was disputed by third parties, the matter is referred to the local "customary" court. Otherwise the administrator would deliver to the claimant an official record (*livret foncier*), describing the nature of his rights in the land. The land remained subject to local law and while the claimant had no title absolute, third parties could dispute his title only through the courts³⁹⁶.

Thus, *constatation* was an intermediate stop between traditional tenure and land registration. As things would have it, only a handful of Africans (mainly in urban areas), made use of the procedure.

VIII. Limitations Placed on Application of Local Law

A provision akin to the British "contrary to natural justice, equity and good conscience"³⁹⁷ was introduced into French colonies. A local legal rule was not to be recognised or enforced if it was considered "contrary to the principles French civilisation"³⁹⁸. Customs which were alien to French culture were not, for that matter alone, considered contrary to public policy. Thus, polygamy, for example, was not considered contrary to public policy³⁹⁹.

Both the English and the French provisions were similar, in that they were never defined

³⁹⁴ *ibid.*

³⁹⁵ "Establishment of the land rights of natives". AOF Decree of 8 October 1925, 35 Penant III (1926) p.51; AEF Decree of 10 February 1938, 47 Penant III (1938) p. 192; Togo - Decree of 13 August, 1934, 45 Penant III (1936), p. 317; Cameroon - Decree of 21 July 1932, 42 Penant III (1933), p. 33.

³⁹⁶ *ibid.* See Decrees at footnote 384 above.

³⁹⁷ See later, Chapter Six.

³⁹⁸ AOF Decree of 16 August 1912, Art.36. 21 Penant III (1912), p. 282.

and the courts interpreted them on individual case basis⁴⁰⁰. However, the French constitution of 1946 retained the "*statut coutumier*", which was viewed in certain quarters as a guarantee of the application of local law⁴⁰¹. This must have made judges reluctant to interfere with local legal rules.

A second limitation was developed by the courts which felt they had a duty to fill any *lacuna* which the local system might have⁴⁰². However, except in the case of Togo, none of the various decrees expressly provided that where customary law was silent on an issue or where a remedy was unknown to the customary law, French law was to apply⁴⁰³. An example where this arose was in a case regarding liability of the master for the acts of the servant. In a Cameroonian case, the defendant's employee negligently injured the plaintiff with the defendant's truck. However the local law, the law of Douala, did not know vicarious liability. The court therefore applied the French civil code and held the defendant liable⁴⁰⁴.

A third method used to limit the application of local law was the option granted to a person subject to "*statut coutumier*" to opt for the application of French Law to individual transactions and matters⁴⁰⁵. In this way, two Africans, subject to local law, could provide that their contract was to be governed by the principles of the civil code⁴⁰⁶. The provision applied to Moslems as well and they could freely make a will according to French law⁴⁰⁷. At times, the choice of French Law was said to be implied in the mode of transaction. In the Cameroonian case mentioned above, the court ruled *inter alia*, that the defendant had impliedly opted for French Law since he had taken out an insurance policy completed in the French form. Under French Law, motor insurance automatically covered a servant. The major exception to this rule was that Africans subject to "*statut coutumier*" could not

³⁹⁹ Salacuse, p. 60.

⁴⁰⁰ *ibid*, at p. 60.

⁴⁰¹ *ibid*, at p. 61.

⁴⁰² Salacuse, p. 61.

⁴⁰³ Decree of 22 November 1922, Article 32, 32 Penant III (1923), p. 86.

⁴⁰⁴ Cameroon, Judgment of 28 September 1933. I Penant (1934), p. 157.

⁴⁰⁵ Salacuse, pp. 62 – 63.

⁴⁰⁶ *ibid*, at p. 63.

contract a marriage according to civil law. But even this was removed in 1947⁴⁰⁸.

IX. Conflict of Laws

Unlike the British colonial governments⁴⁰⁹, the French rarely enacted legislation on choice of law. Thus, only a few decided cases exist as a guide. In contract cases, the courts usually applied the law intended by the parties⁴¹⁰. The law applicable to succession was the personal law of the deceased⁴¹¹.

As in British colonies, the major conflicts involved marriage and family law, especially the legal status of a Christian marriage. The difficulty was that a marriage celebrated by a Christian minister alone was not recognised as a "Christian customary marriage"⁴¹². This remained the position until the decree of 1951⁴¹³ "...rélatif à certaines modalités du mariage entre personnes de statut personnel en AOF, en AEF, au Togo et au Cameroun" somewhat clarified the matter. The decree was not totally helpful as it dealt only with monogamous marriages, the assumption being probably that a monogamous marriage necessarily equalled a Christian marriage. The decree declared that a marriage according to local law was the appropriate form of marriage for Africans who had not renounced their local personal law, thus abolishing the so-called "Christian customary marriage". Marriage under the civil code was possible for Africans only if they had renounced their *statut coutumier*. The decree abolished any claim for a dowry or other customary payment in respect of marriage under local law where the woman was over the age of 21 or had previously been married⁴¹⁴.

In the case of unmarried women under 21, maximum rates were fixed and provision was

⁴⁰⁷ Judgment of 6 September 1929, 32 Recueil Daresté III (1929), p. 182.

⁴⁰⁸ Decree of 19 November 1947, [1947] Journal Officiel (Fr.), p. 11480.

⁴⁰⁹ See for example, Supreme Court Ordinance, Section 14 of 1876; Salacuse, p. 63.

⁴¹⁰ Salacuse, p. 64.

⁴¹¹ Rolland & Lampué; *Droit d'outre-mer*, 3rd ed. 1959, pp. 220-221.

⁴¹² Herschenroder, M. F. P; "Study of the Law Applicable to Native Christians in the French Dependencies and in India", *Journal of Comparative Legislation and International Law*, 1935, 3rd Sess. 18: pp. 186 - 194.

⁴¹³ No.51-1100 of 14 September 1951.

⁴¹⁴ *ibid.*

made for disputes to be heard by the *Tribunaux de premier degré*, composed of an Administrative Officer and African assessors. Where the tribunal considered the dowry demanded excessively high, it had power to grant a certificate for the marriage to proceed without the consent of the woman's relatives⁴¹⁵.

The decree also gave legal effect to contracts of marriage under local law based on a promise of monogamy by providing for the legal enforcement of the promise⁴¹⁶. The theory appears to be that a marriage regulated by the decree could still remain governed by local law. There could be difficulties here as the decree is able to deprive the marriage of essential validity under local law as it had prohibited the payment of dowry and also disregarded parental consent⁴¹⁷. Thus, a marriage under the decree could find itself in a legal *limbo*, not governed by the civil code, as it was essentially a customary marriage, nor by local law, which, as the *lex loci celebrationis*, had not been followed. Where the conflict was between two or more local legal systems, the French exceptionally enacted choice of law rules on certain issues⁴¹⁸. The rules provided the following:-

(i) Marriage

In all questions relating to marriage, divorce, custody of children or rights of a wife, when the marriage is dissolved by divorce, repudiation or death, the applicable law is the law governing the marriage. If there was no marriage contract, the customary law of the woman's locality applied.

(ii) Wills and Succession

Questions relating to wills and succession were governed by the customary law of the deceased.

⁴¹⁵ *ibid.*

⁴¹⁶ Philips; 4(2) *Journal of African Administration*, pp. 79 - 80.

⁴¹⁷ See Dobkin, Marlene; "Colonialism and the Legal Status of Women in Francophone Africa", 1968, 8 *Cahiers d'études africaines*, pp. 390-405.

⁴¹⁸ AOF Decree of 3 December 1931, Art. 6. 41 Penant (1932), p. 149; Togo-Decree of 21 April 1933, Art.6.47 Penant (1938), p. 258; Cameroons-Decree of 31 July 1927, Art.51. 36 Penant (1927), p. 354; AEF; Decree of 29 May 1936, Art. 51, 14 Penant (1937), p. 16.

(iii) *Contracts*

Contracts, other than of marriage contracts, are to be decided according to the law generally followed at the place where the contract was made ie, *lex loci contractus*.

(iv) In all other matters, the customary law of the defendant applied.

How French colonial authorities interpreted these rules will be dealt with below.

B. Application of the Choice of Law Rules, 1814 - 1946

I. 'Natives' who were French Citizens

With assimilation occupying such a prominent position in French colonial policy, one would have thought that natives who managed to become assimilated and became French citizens would be granted all the rights due to a French citizen in France. However, this was not the case because, as the French argued, the political organisation in the colonies was different from that in France itself⁴¹⁹. There was no representation of colonial peoples in the French Parliament until after the Second World War, nor were there elected local councils until after the War⁴²⁰.

Secondly, the civil law of the colonial French citizen was not derived from French law itself but was the result of legislation specially enacted for each colony. Even the metropolitan French citizen residing in the colony was not subject to the law of France, as another French citizen residing in France was, nor indeed as he would be if he were residing in a "foreign" state, in which case conflicts rules would have called for the application of the law of France⁴²¹. Only upon arrival on French soil, was it possible for these colonial citizens to

⁴¹⁹ Solus, Henry; *Traité de la condition des indigènes en droit privé*, 1927, p. 13.
Hereafter cited as Solus.

⁴²⁰ *ibid*, at p.13.

⁴²¹ *ibid*, at p.13.

enjoy the full rights of a French citizen⁴²². Thus, there was a basic weakness in the concept of assimilation.

One of the reasons for this discrepancy in citizens' rights appears to be the patronising attitude the French adopted towards the colonial peoples. Thus, French civil law could not apply to the "assimilé", as it was "...dangereux de leur accorder tous les droits politiques et les libertés individuelles à la jouissance desquels ils ne sont pas préparés"⁴²³.

II. The Origins of the Extension of Citizenship to the Colonies

The French Revolution and its principle of "liberté, égalité et fraternité", were the grand vision behind the concept that colonised peoples could obtain French citizenship. It was passed into legislation on 15 May 1791 and gave "people of colour" and enfranchised slaves the same civil and political rights as Europeans. This state of affairs remained until slavery was re-introduced in the Napoleonic era but was revived after 1830 when several ordinances were enacted creating complete equality between blacks and whites, especially in the colonies of Martinique, Guadeloupe, Bourbon (Réunion) and French Guyana⁴²⁴. The Law of 24 April 1833 further extended the principle to all colonies. Article 1 provided that:

"Toute personne née libre ou ayant acquis légalement la liberté jouit, dans les colonies françaises: 1. des droits civils, 2. des droits politiques, sous les conditions prescrites par les lois.

Article 2. Sont abrogées toutes dispositions de lois, édits, declarations du roi, ordonnances royales...et notamment toutes restrictions et exclusions qui avaient été prononcées, quand à l'exercice des droits civils et des droits politiques à l'égard des hommes de couleur libres et des affranchis."

⁴²² *ibid*, at p. 14.

⁴²³ Solus, p.15.

⁴²⁴ *ibid*, p. 15. The ordinances of 7 September 1830 and 24 February 1831.

There were substantial differences between the law of 1833 and original law of 1791 which created equal rights. The egalitarian motives behind the Law of 1791 were somewhat modified in the new law. Thus, the new policy was "assimilation" and the propagation of "le benifice des lois français"⁴²⁵. Furthermore, these rights could only be enjoyed "sous les conditions prescrites par la loi". In any case, it was over-optimistic of the French to suppose that one single piece legislation could, overnight, transform Africans, living under very different conditions, into Frenchmen.

III. The Law of 29 September 1916

As regards the inhabitants of the four communes of Sénégal, the Law of 29 September 1916 stated that:

"Les natifs des quatre communes de plein exercice du Sénégal et leurs descendants sont et demeurent des citoyens français"⁴²⁶.

Therefore being a French citizen depended upon the chance of being born within any of the four "communes" and not one kilometre outside it. This arrangement could have problems though. Suppose a non-resident Sénégalaise woman gave birth to a child in one of the communes. Her child would be a French citizen while she remained Sénégalaise. It would be irrelevant that place of birth was the only connection the child had with the commune and that he had no intention of ever residing there. Indeed his descendants would be French citizens! It is not clear why the French found it necessary to give the communes a special status, as Article 109 of the 1848 Constitution had declared Sénégal an extension of France overseas.

The imposition may have been found necessary to deprive the communes of their local legal systems, while the rest of Sénégal retained their customary legal systems in full. The idea

⁴²⁵ *ibid*, at p. 16.

⁴²⁶ Recueil Dareste I (1916), p.716; 3 Penant (1916), p. 316.

that the inhabitants of the communes were now subject to the family law, religious laws and laws of succession of France must have been unbearable. The imposition of French Law must have brought uncertainty and conflict into communities which had no wish to abandon their own legal systems.

Even more perplexing was the provision that the inhabitants of the communes "sont et demeurent français", thus they were not only regarded as French from the enactment of the legislation but also retroactively before the Act came into force. They had always been French. The consequences must have been far-reaching. All legal relations and acts entered into according to local laws before the enactment of the law and which conflicted with the French civil code, stood the danger of being declared a nullity. Marriages celebrated according to local law would be invalid and children of such marriages would be illegitimate; divorces not conforming to the French code would be invalid, with the possible instances of bigamy; polygamous marriages which took place before the Act came into force would entail criminal offences; gifts, testamentary dispositions etc would all be affected⁴²⁷. It is difficult to appreciate the wisdom behind the retroactivity inherent in the legislation, in view of the uncertainty and disruption of social life it was likely to bring about.

The courts recognised the difficulties posed by the Law of 1916 and proceeded to interpret it strictly. In a judgment of the Court of Appeal of Afrique Occidentale Française (AOF), the court refused to confer French citizenship on a Moslem born outside the four communes but of a mother who was born in one of them⁴²⁸. The court found a loophole which enabled it to hold that in Islamic Law as well as in French Law, a child assumed the citizenship of the father, not of its mother. It seems however that the real reason for the decision was the anxiety to limit the number of Sénégalaise who could validly claim French citizenship. It is unlikely that the judgment would have gone the other way if the plaintiff had been a non-Moslem from a matriarchal community. Nevertheless it is also possible that the court was attempting to avoid the inextricable conflicts which were likely to arise in cases such as the

⁴²⁷ The Appeal Court (Cour d'Appel de l'AOF) recognised this danger in its judgment of 8 December 1920. *Recueil Dareste III* (1922), p. 169.

⁴²⁸ Judgment of 5 September 1924, *Recueil Dareste III* (1925), p.106; *Pennant I* (1925), p. 11.

one before it but the suspicion remains that the first interpretation is correct.

In a series of decisions the courts confirmed this suspicion. In its judgment of 4 December 1924 the court held that the fact that a native of one of the communes had French citizenship, did not preclude him from retaining his "statut coutumier"⁴²⁹. In another judgment of 2 April 1926, the court was quite explicit and held that the law of 1916 was meant to entice Sénégalaise men to enlist in the French army during the First World War and that the intention was never to deprive them of their "statut coutumier"⁴³⁰. The court doubted that a complete loss of status was what the legislator had in mind.

Despite the explanations of the Court of Appeal, it is difficult to accept that the French legislator was only interested in the limited use of French citizenship for military purposes and had no intentions whatsoever of allowing the "natives" to enforce their rights as French citizens. The retroactive nature of the legislation appears to indicate that there were wider policy reasons for enacting the law. A French citizen resident in one of the communes ought to be in the position to enjoy the civil and political rights available to French citizens from France, at least the rights in force in the colony. However, as matters stood, a "native" was capable of enjoying those same rights only upon naturalisation while he could not do so were he born in one of the four communes in spite of having French citizenship. Furthermore, the law of 1916 placed no restriction whatsoever on citizenship obtained through birth of a resident of the four communes. In any case, since there were no local (or native) courts in the four communes, it is difficult to see how the inhabitants were supposed to organise their affairs according to non-French law.

IV. French Subjects

The general notion was that, any colonial person who possessed French citizenship was a French subject. However, French policy on the subject was inconsistent and at times, the

⁴²⁹ Recueil Daresté III (1925), p.176.

⁴³⁰ Pennant I (1926), p. 197.

subject could be either:

1. a French citizen, or
2. an African who was regarded as a French citizen resident in a French colony but who could not enjoy the rights of a French citizen.

However, the concept "French subject" was more readily understood to mean that all colonial persons who were not born in a commune were French subjects.

V. Administered Territories

After the First World War, the Peace of Versailles placed half of the former African German colonies of Cameroon and Togo under French administration and the other half of Cameroon and Togo and Tanganyika under British rule and South West Africa under South African administration to be governed as trusteeships under the supervision of the League of Nations. The Council of the League of Nations in its session of 22 April 1923, passed a resolution which elaborated the mandate granted to the Allied Powers⁴³¹. Resolution 1 stated that the status of the citizens of the mandated territories is distinct from that of the mandatory power and was never to be assimilated by any means.

Resolution II further stated that under no circumstance were the inhabitants of a mandated territory to assume the nationality of the mandatory power, simply because benefits were being conferred upon them. However, Resolution III permitted individuals of a mandated territory to obtain by way of naturalisation, the nationality of the mandatory power.

VI. Strangers Assimilated into Local Colonial Population

Metropolitan French citizens who found themselves living in a French colony were subject largely to French civil law and such French law as was enacted for the colony. However, there were times when a French citizen would abandon the French way of life altogether and

⁴³¹ The Council, 24th Session, April 1923. Official Journal, League of Nations, 1923. N.6, p. 567.

develop a greater affinity with a local African community, adopt their ways and laws, join their institutions and religion. In such cases it was irrational to pretend that he was still subject to the "statut civil":-

"...Il a semblé logique de les considérer comme des indigènes, de les assimiler aux indigènes"⁴³².

These "étrangers assimilés aux indigènes", as they came to be known, were therefore subject to the particular "statut coutumier" under which they came. However, the following rules were formulated to govern the choice of law process involving them.

1. All legal acts between the 'assimilé' and the locals are governed by local law⁴³³.
2. Criminal and tortious liability by the 'assimilé' is governed by local law⁴³⁴.
3. The 'assimilé' is amenable, in all other matters, to the same local courts as the locals⁴³⁵.
4. The capacity of the 'assimilé' to acquire or own immovable property is governed by the local law. However, the locals were not to place any undue restrictions on the 'assimilé'⁴³⁶.

In West Africa, there was no general agreement regarding the law applicable to the 'étranger assimilé' but there were provisions in the various decrees indicating a choice of law in the matter. For French West Africa (AEF), Article 2 of the Decree of 22 March 1924⁴³⁷; for Cameroon, Article 1, Decree of 13 April 1921⁴³⁸ and for Togo, Article 3, Decree of 22 November 1922⁴³⁹. However, the general approach shown above was kept.

⁴³² Solus, p. 60.

⁴³³ Cour d'Appel de l'Inde-Chine, 14 April 1910, Recueil Daresté III (1911), p.175. Apparently French Law continued to govern an act between the 'assimilé' and another French citizen.

⁴³⁴ Cass. Crim. 16 janvier 1913 et 30 janvier 1913, Recueil Daresté III (1913), p. 175.

⁴³⁵ *ibid*, at p. 313.

⁴³⁶ Several agreements were signed in Asia with the locals to protect the 'assimilés, eg Art 4, Treaty of 9 June 1885 (Tonkin), the Royal Ordinance of 13 May 1909 (Cambodia).

⁴³⁷ Recueil Daresté I (1924), p. 206.

⁴³⁸ Recueil Daresté I (1922), p. 383.

VII. Persons of Mixed Race and Persons of Unknown Parentage

Persons of mixed race (of black and white parentage) were a common phenomenon in the colonies but the French policy of ascribing a status to everyone mainly according to race, made it difficult to decide what to do with people of mixed race. Were they to be regarded as French citizens simply because of the "sang français qui coule dans leurs veines"⁴⁴⁰? Were they 'assimilés aux indigènes'? Or should an intermediate category between the French and the indigenous population be created for them? The French authorities rejected the third solution because of the dangers of creating a class of mixed races apart, who would have less rights than the French (and therefore be jealous of the French) and would have more rights than the Africans (for whom they could develop contempt). Most probably, the authorities felt they ought to learn from the example of Saint-Dominique (Haiti), where whites had unwisely provoked the anger and hatred of people of mixed races⁴⁴¹.

The only solutions left to be considered were the first two: assimilation into European society or assimilation into indigenous society. Legally the solution was not simple. How were mixed children to be assimilated? Which parent was to be decisive in the choice of a status? Which nationality were they to adopt? For many years the French authorities avoided these issues and left them to the courts to solve on an individual basis. By the end of the Eighteenth Century, philanthropic societies were established to deal with this acute problem. In 1894, the "Association de protection des enfants métis du Tonkin" was formed. In 1925, it was transformed by decree into the "Société d'assistance aux enfants abandonnées franco-indo-chinoises"⁴⁴². A similar society was formed in 1900 in Madagascar. The activities of these societies led to the issue of the Decree of 1925, regulating the status of persons of mixed race. The Decree classified mixed races into two large groups, (a) mixed persons of known parentage and (b) mixed persons of unknown parentage.

⁴³⁹ Recueil Dareste I (1923), p. 137.

⁴⁴⁰ Solus, p. 73.

⁴⁴¹ Parkinson, W; *'This Gilded African' Toussaint L'Ouverture*, 1980, pp. 131 –136.

⁴⁴² Pennant III (1925), p. 148.

The courts had no opportunity to consider such cases as the African father usually had the mixed child brought up as an African. Such mixed children did not turn to the French courts seeking French citizenship. It is difficult to guess how the courts would have dealt with such a case⁴⁴³.

IX. Mixed Child Born in Wedlock to a French Father and an African Mother.

A mixed child born in wedlock to a French father and an African mother is a French citizen, according to the French Civil Code, which lays down as follows:-

"French citizens are individuals born of a Frenchman in France, in the colonies or in a foreign country"⁴⁴⁴.

Further, an African woman who married a Frenchman had a right to French citizenship and therefore there may have been no doubt about the status of the child.

X. Mixed Child born to Unmarried Couple

The legal complications arose in cases where the parents of a mixed child were unmarried but wished their child to be recognised as a French citizen. If the French father recognised the child as his own, Article 8 Paragraph 1 of the Civil Code applied and the child "...suivra la nationalité du père". This was still the case even if the French father and the African mother recognised the child simultaneously⁴⁴⁵. As long as the French father recognised the child, it became French, even if the recognition was the result of a court order of the colonial court⁴⁴⁶. This legal position was originally adopted by the Decree of 7 February 1897 which first applied only to Martinique, Guadeloupe and Réunion but came to apply to all French colonies. The general rule was that a child whose filiation was established during minority

⁴⁴³ See Solus, p. 75.

⁴⁴⁴ French Civil Code, Article 8, para 1.

⁴⁴⁵ Solus, p. 76.

⁴⁴⁶ Loi du 16 Novembre 1912.

by recognition, acquires the nationality of the recognising parent⁴⁴⁷. If the recognition was by the French father, the child was French, and African of the relevant country, if recognition was by the African mother⁴⁴⁸.

There were however, difficulties in applying the rule, for, unmarried French fathers often did not recognise their children and left them to their mothers to bring up alone. Consequently, many of the children grew up in poverty. Soon, French philanthropists found a loophole in the Decree of 1897 and began to exploit it. It began in Indo-China, where a certain Mr. Honoré Bodin decided to recognise as his natural children, every single illegitimate child of mixed race in Indo-China, who wished to acquire French citizenship⁴⁴⁹. Soon his example was being followed in other French colonies⁴⁵⁰. The French Government acted quickly to stop this traffic in mixed children⁴⁵¹. However the colonial French courts did not see things the Government's way and held that the Minister for Public Order could not challenge the recognition of a child as he was not on the list of eligible people who could mount such challenge⁴⁵². The court also felt that the minister could not, in the name of public order, interfere with the honour and the peace of family life⁴⁵³.

Not surprisingly, the Government changed the law. The Decree of 7 November 1916 came into effect in Madagascar and reformed the law of that country. In traditional Madagascan law, a child was born with its own status and needed no recognition. A child born out of wedlock acquired the mother's personal law⁴⁵⁴. The Decree of 7 November now created the possibility for a father of French citizenship, or 'étranger assimilé', to recognise his mixed child born out of wedlock. The recognition had to be effected before the Procurator

⁴⁴⁷ Decree of 7 February 1897.

⁴⁴⁸ Cour d'Appel de l'Indo-Chine, 10 Septembre 1903. Recueil Dareste III (1904), p. 44.

⁴⁴⁹ Girault, Arthur; *Principes de colonisation et de législation nationale*, p. 347.

⁴⁵⁰ *ibid.*, at p. 347.

⁴⁵¹ See the circular from the Lt. Governor of CochinChina of 8 April 1909 in Recueil Dareste III (1911), p. 178.

⁴⁵² Cour d'Appel de l'Indo-Chine, 18 novembre 1910. Recueil Darest III (1911), p. 178. The Court relying on Article 339 of the Civil Code.

⁴⁵³ *ibid.*

⁴⁵⁴ Cour d'Appel de Madagascar, 19 mai 1921. Recueil Dareste III (1922), p. 172.

(Procureur de la Republic), who must be satisfied that the recognition was sincere⁴⁵⁵. If the Procurator was satisfied, a tribunal was convened and the Minister of Public Order had the right to challenge the recognition and appeal against the decision if it went against him⁴⁵⁶.

The decree also gave the Minister wide discretionary powers to stop any recognition hearing he disagreed with. Article 15 provided that:-

"...le Ministère public, s'agissant d'office, dans un intérêt d'ordre public pourra, en ce qui concerne certaines reconnaissance antérieures à la promulgation du présent décret et postérieurs au 1er juillet 1916, qui lui paraîtraient avoir été faites sans aucune garantie de sincérité et dans un but frauduleux, se pourvoir directement en annulation des dites reconnaissance devant les tribunaux compétents....Un délai d'une année à compter de la promulgation du présent décret sera accordé au ministre public à ces fins."

The French Government further extended the legislation to apply to all its colonies in a series of decrees⁴⁵⁷. Thus, the new decrees amended Article 339 of the Civil Code by adding the Minister of Public Order to the list of interested parties who could challenge a recognition proceeding concerning a mixed child⁴⁵⁸.

XI. Mixed Child Recognised by each Parent in a Succession

Generally where the French father recognised the mixed child, the child is French⁴⁵⁹. Suppose however, that the mixed child were recognised by the African mother first and then by the French father next. What status did the child have? This is a hypothetical situation and there are no decided cases on it but Solus thinks that where the African mother was a French subject, the child was also a French subject, ie the child had *statut coutumier* and

⁴⁵⁵ Article 3.

⁴⁵⁶ Articles 5 and 6.

⁴⁵⁷ For example, Article 2 of Decree of 15 December 1922.

⁴⁵⁸ Article 339 of the Civil Code did not previously include the Minister of Public Order as an interested person to the proceedings.

the subsequent recognition by the French father could not change the child's status⁴⁶⁰. Solus however leans heavily towards French citizenship where the mother was a French citizen and the father was not. As stated before, African fathers had their children brought up as Africans and did not care for French citizenship for their mixed children. Solus however argues that the child ought to have been allowed to benefit from both cultures so that he may choose which of both cultures was "most advantageous"⁴⁶¹. Solus does not reveal how the test of "most advantageous" is to be applied and by whom. If the choice was made by the African father, the child would almost likely be made to regard the African culture as the "most advantageous", while the French mother would almost invariably choose French status. The fact that the French colonial government omitted to legislate on the matter indicates that the problem did not exist or if it did, was not serious.

XII. Mixed Children of Unknown Parentage

Children of unknown parentage must not be understood literally to mean that the parents were actually unknown but that neither the paternal nor maternal parentage was legally established voluntarily through recognition or by court order. The position is governed by Article 8(2) of the Civil Code, as amended by the Decree of 7 February 1897. It provides:

"(2) Est français...tout individu né aux colonies de parents inconnus ou dont la nationalité est inconnu..."

This provision would have afforded all illegitimate children the opportunity of becoming French citizens, regardless of race. To prevent that from happening, the Decree of 7 February 1897 provided in Article 17 that,

"Il n'est rien changé à la condition des indigènes dans les colonies françaises".

Thus, the provision did not apply to Africans residing in French colonies.

⁴⁵⁹ Article 8 of the Civil Code, as amended by the Decree of 7 February 1897.

⁴⁶⁰ Solus, p. 80.

A combination of Article 8(2) of the Civil Code and Article 17 of the Decree of 1897 produced the following result. Article 8(2) applied only to mixed children of whom one parent was French or *étranger assimilé*. Children whose parents were both African could not claim this right. However, there were inherent contradictions in the rule. Article 8(1) of the Civil Code provided that a mixed child acquired French citizenship only when its French father legally established his paternity⁴⁶². And yet Article 8(2) appears to grant such mixed children French citizenship anyway, even if the father failed (or refused), to recognise him. Why then did the law refer to these children as children of unknown parentage?

It would have been easier to declare all mixed children whose parentage was unknown African but the French disapproved of this approach as it was French policy to encourage mixed children to become French. However, the policy undermined the stated French doctrine of assimilation by which there should have been no distinction between unrecognised children of African parentage and unrecognised mixed children. As far as status was concerned such children should all have been classified either African or French. Secondly, an unrecognised child of pure African parentage was automatically *indigène*, since status was acquired through the father. If the parents did not exist in law, how was the child identified as having *statut coutumier*?

Case law on the subject is not very helpful. The courts tended to interpret the provisions strictly and were willing to refuse civil status. The Court of Appeal of Indo-China held that Article 8(2) of the Civil Code could not apply to a mixed child who claimed that although his father was French, he was unable to trace his mother. Such a child could not claim French citizenship⁴⁶³. It is difficult to discover the wisdom behind this judgment. The *onus* of establishing paternity ought to lie on the parents and not on the child and it was precisely in cases such as this, where the parents failed to do this, that the child was entitled to the rights provided in Article 8(2). It is difficult to avoid the conclusion, that the courts were unwilling to confer French citizenship on children of mixed race whose parents were legally unknown. The logical conclusion to be drawn from the judgment is that a mixed child

⁴⁶¹ *ibid*, p. 82.

⁴⁶² See above page 112.

whose parents failed to establish paternity, had no status at all and therefore no personal law, with all the consequences that such a conclusion would entail.

After 1920 however, the courts began to redress this short-coming, as evidenced in two important judgments, namely the judgment of 20 October 1921⁴⁶⁴, in Pnom-Penh, Cambodia and of 28 March 1923, in Noumea, French Caledonia⁴⁶⁵. Both decisions now stated that a mixed child born in the colonies and whose parents had not established their paternity but who had been brought up and educated as a French person may not be refused French civil status. He was to be classified as a person born of an unidentified French father and of an unknown mother⁴⁶⁶.

There is little doubt that Article 8(2) was meant to provide a personal law (or status) for illegitimate mixed children whose French fathers had left the colony without establishing their paternity; or the French father had abandoned the child right from birth; or the child's father had died before completing the legal formalities. In all these situations, it would be reasonable for the child to acquire the French civil status as his personal law. The decisions cited above however, fail to implement the *rationale* behind the legislation. The idea that the child had to be brought up and educated as a French citizen before benefiting from Article 8(2) appears to defeat the purpose of the legislation. Clearly illegitimate mixed children whose French fathers had left the colony or had died, would be unable to benefit from the provision, for it would now be left to them to establish, not only the French citizenship of their fathers but also that they had been brought up and *educated* as French citizens. Not an easy task for children who had spent all their lives outside France and possibly in non-French communities.

Solus suggests that where the mixed child is unable to establish the French nationality of his father, the court should examine the race of the child, to determine whether he should pass

⁴⁶³ Cour d'Appel de l'Indo-Chine 28 mai. Pennant I (1903), p. 312.

⁴⁶⁴ Recueil Dareste III (1922), p. 118.

⁴⁶⁵ Tri. civ. de Noumea, 28 mars 1923. Recueil Dareste III (1924), p. 109.

⁴⁶⁶ *Français né de père français non désigné et de mère inconnue*.

for white (in which case he acquires French civil status), or be considered indigenous⁴⁶⁷. Herein lay the major weakness of the French policy of relying on race to establish the personal law or status of the individual. The personal law of a person ought to be the law with which he has the closest connection and not the law which is held to be appropriate for his race. If Solus' view should prevail, then it is quite possible that the indigenous mother of an illegitimate mixed child and who also has a pure indigenous child, could face the situation where her two children had two different personal laws, although they had been brought up together in the same community and cultural environment.

XIII. The Law of 16 November 1912

In an attempt to ameliorate this situation, the French Government passed the law of 16 November 1912. Article 4 of the new law entitled the mixed child to seek his father in France and if he could identify him, he was entitled to French citizenship. However, the authorities were unwilling to allow anyone who claimed this right to take advantage of it. Article 4 also provided that the local colonial authorities could determine that Article 4 applied only in cases where the child's mother and the purported father were both French citizens or belonged to the category of *étrangers assimilés*. This restriction saw to it that in some colonies, only few unrecognised children acquired French citizenship. In some colonies, children of mixed race were excluded altogether from benefiting under the new Article 4⁴⁶⁸. In West Africa, the courts interpreted the provision in such manner that it excluded children of mixed race altogether⁴⁶⁹. Even in colonies where children of mixed race could start litigation in France to establish the identity of their fathers, the sheer cost and duration of such litigation rendered the new law academic to most who qualified.

⁴⁶⁷ Solus, p. 88.

⁴⁶⁸ eg in Indo-China. See Arrêté de Promulgation du 19 juin 1913. Journal Officiel Indo-Chine, 23 juin 1913.

⁴⁶⁹ Cour d'Appel de l'AOF, 12 mars 1920, Recueil Dareste III (1923), p.135.

French territories in Africa south of the Sahara were colonies. Therefore the indigenous population retained their African status. However, the French policy of assimilation sought to encourage Africans to opt for French citizenship. Several methods of acquiring French nationality were open to Africans.

(a) Naturalisation

Naturalisation had several legal effects, depending on whether the applicant was a French subject. French subjects were considered Frenchmen but without the rights of a French citizen. Technically therefore, naturalisation for them simply meant accession to the rights of a French citizen. However, French subjects and colonial subjects were subjected to the same procedure when applying for citizenship and therefore the so-called rights of the subject were dubious. To qualify to apply for naturalisation, the African had to demonstrate that he was sufficiently educated in the French manner, that he had acquired French culture and civilisation and that he possessed sufficient aptitude to assimilate⁴⁷⁰.

A decree was issued for each colony regulating naturalisation and the requirements were consequently varied to suit the needs of each colony. The conditions imposed on colonial subjects were less rigorous than those imposed on non-subjects. This is because the French actually thought of their colonial subjects as Frenchmen without French rights.

In West Africa, naturalisation as a policy was introduced quite late, in 1912, by the Decree of 25 May 1912⁴⁷¹. This decree was augmented in 1918 by the Decree of 14 January 1918⁴⁷², making it possible for Africans who had distinguished themselves in the French Army during the First World War, to naturalise.

An applicant had to satisfy several conditions before being considered for naturalisation. The conditions for West Africa were far more rigorous and complicated than those for Madagascar. Solus thinks this was because the French considered Madagascans better

⁴⁷⁰ Solus, p. 96.

⁴⁷¹ Recueil Dareste (1912), p. 649; Pennant III (1912), p. 226.

The conditions for West Africa were far more rigorous and complicated than those for Madagascar. Solus thinks this was because the French considered Madagascans better prepared for assimilation than West Africans⁴⁷³. The conditions were laid down in Articles 1 and 2 of the Decree of 25 May 1912:-

1. The applicant must be born and domiciled in any territory comprising the AOF;
2. Must have attained the age of 21;
3. Must possess the ability to read and write the French language, unless he has been decorated with the Legion of Honour (Légion d'honneur), or other similar military order, or has seen active service in France or in the colonies;
4. Must show proof of source of income and must be of decent life-style and manners;
5. Must show proof of devotion to French interests or must have occupied, with merit, for ten years at least, a public or private position of importance.

The Governor - General's Order of 29 October 1912⁴⁷⁴, laid down details about the procedure to be adopted in submitting applications and of how proof of qualification was to be established.

Procedure: The applicant had to present himself before the mayor of the community in which he lived or before the District Commissioner of the district in which he resided and declare that he was willing to be governed by the civil law which applies to French citizens. If the applicant succeeded and naturalised, his personal law ceased to be his local legal system, which he would have renounced. Although the acquired French status was personal to the individual, any woman he married under civil law, automatically assumed his personal law, ie French law. All children who were minors at the time of naturalisation, also acquired the new status⁴⁷⁵. Subsisting polygamous marriages became immediately invalid and only the wife married under French law (if any) was recognised and assumed her husband's new status.

⁴⁷² Recueil Daresté I (1918), p. 195; Pennant III (1918), p. 87.

⁴⁷³ Solus, p.105.

⁴⁷⁴ L'Arrêté du Gouverneur-Général, Recueil Daresté I (1914), p. 271.

⁴⁷⁵ Article 6, Decree of May 1912.

In order to compensate individuals who responded to the French call to take up arms in the defence of France during the First World War, a special regime of acquiring French citizenship was created in 1918 - the Decree of 14 January 1918. The procedure established by the regime was much simpler and quicker than under the Decree of 25 May 1912. The applicant needed only to show that:-

- 1 he had served during the war and that he had been awarded a military order and *La croix de guerre*⁴⁷⁶;
- 2 he was of good character⁴⁷⁷;
- 3 he had never participated in any activity detrimental to French rule in the colony⁴⁷⁸;
- 4 he had never been convicted or imprisoned under French law or suffered any punishment under any local legal system⁴⁷⁹.

The decree went further and allowed *all children* and *all wives* of the applicant, to automatically assume French status⁴⁸⁰. A wife was required to give her consent to the inclusion of her children who were above 16 but below 21 but she herself could not ask to be exempted from the new status of her husband⁴⁸¹. The decree thus permitted the individual to retain the polygamous state of his marriage but it remained unclear whether he could marry a further wife after changing his status. Solus believes that the polygamous marriage of a naturalised French African was invalid under French law⁴⁸². This was most probably not the position adopted by the authorities. A polygamous marriage *after* naturalisation would be invalid but not one concluded before naturalisation.

To confer citizenship on a person to show appreciation for loyalty was an unsatisfactory manner of creating a personal law. The community in which a person chooses to live is far more important than loyalty to a foreign country. Further, if a naturalised ex-serviceman may legally indulge in polygamy, why was it denied other naturalised Africans?

⁴⁷⁶ Article 3.

⁴⁷⁷ Article 5.

⁴⁷⁸ Article 5.

⁴⁷⁹ Article 5.

⁴⁸⁰ *Ses femmes et ses enfants*, Articles 3 and 4.

⁴⁸¹ Article 3.

⁴⁸² Solus, p. 72.

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In spite of the favourable conditions created specially to encourage Africans to become French citizens, only a handful took up the opportunity. A report published in the *Journal Officiel* of 9 May 1926 showed that out of a total of 11,107 naturalisations in 1925, only 36 were non-European and only 7 West Africans bothered to apply for and obtain naturalisation⁴⁸³. The report did not say how many applications in all were rejected but it stated that 327 applications from non-colonial subjects were rejected and 8,925 accepted, indicating that rejections from the colonies must have been few. Whichever way the report is interpreted, West Africans had demonstrated decisively that they were unwilling to abandon their own legal systems for a foreign one they were not familiar with.

(c) The Renunciation of *Statut coutumier*

Change of Personal Law as a Result of Change of Religion

In most French colonies in Africa, the predominant religion was Islam, which also provided the personal law. Where a religion also automatically provides the personal law, a change of religion also means change of personal law. Where however, the change of religion is to, say, Christianity, which does not provide a personal law, there should be no change in personal law. Further, the French did not create a Catholic or Protestant status as such and conversion to Christianity should not have required change of status. When a Moslem converts to Christianity, it is arguable that his personal law remains Islamic, as Christianity has no legal system which accompanies it. If there is merit in this argument then, then the

⁴⁸³ The 7 came from the following countries:- Sénégal 2, one under the Decree of 25 May 1912 and the other under the Law of 25 March 1915; Ivory Coast 3, 2 applied under the Decree of 25 May 1912 and 1 under the Law of 1915; Dahomey, 2 and their 3 minors, both applied under the Decree of 25 May 1912. None under the Decree of 1918.

The French hatred for and fear of Islam, however, led the courts to hold that the principles of Islam and the Catholic religion were incompatible and therefore a conversion to Catholicism should also entail change or abandonment of Islamic law as the personal law⁴⁸⁴. It is difficult to support this position as the rules embodied in Christianity (such as monogamy), are merely appeals to conscience, unless they are incorporated into the legal system of the country. If conversion to Catholicism also meant acquisition of the civil status, then this would be an additional method of obtaining that status which should have been provided for in colonial legislation. Conversion to Christianity should have been seen only as a religious act and no more. If there should be any change of status at all, then the change should be to the local customary law, which might end up being Islamic law.

In cases where the two religions have conflicting rules on an issue, the later religion ought to prevail. Such was the position adopted by the Court of Appeal for West Africa⁴⁸⁵. The Court held that a converted African, who married according to Christian rites, did not thereby abandon the *statut coutumier*, as there was no such thing as a *Catholic status* which could provide a personal law. Solus disagrees with the court's decision arguing that the absence of a *Catholic status* was a *lacuna* which the court ought to have filled⁴⁸⁶. According to Solus, the Canon Law is sufficiently clear on certain areas of the law, such as that of the family. That may be the case but in a plural-legal system, what may be seen as a *lacuna*, calling for "legislation" by the court, may in fact be a denial of a rule in another legal system. Polygamy was valid under the personal law of the plaintiff and the conversion to Catholicism could not have suddenly created a *lacuna* in either French law or the applicable local legal system. Secondly, it seems inaccurate to claim that the unenforceability of monogamy in French Africa was due to a *lacuna* in the legislation. The fact was that monogamy remained a rule of the Canon Law but it was unenforceable in a civil court of law. An unenforceable rule does not necessarily create a *lacuna* which the judge ought to fill by making the rule enforceable

⁴⁸⁴ Trib. 1er Inst. Saint-Louis, 8 mars 1902; Cour d'Appel du Sénégal, 29 juin 1903, Recueil Dareste III (1905), p. 180; Trib. 1er inst. Saint-Louis, 5 août 1913, Recueil Dareste I (1914), p. 43.

⁴⁸⁵ Cour d'Appel de l'AOF, Pennant I (1925), p. 101.

⁴⁸⁶ Solus, p. 157.

CHAPTER SIX

CHOICE OF LAW IN ENGLISH-SPEAKING AFRICA

Historical Introduction

I. The Gold Coast

In 1471, the Portuguese landed in the Gold Coast, now Ghana, and found so much gold to purchase that they named the spot where they landed, El Mina (the Mine)⁴⁸⁷. By 1472, the Portuguese King, John II decided to build a fort and a church at El Mina. He dispatched a squadron, consisting of ten caravels and two transporters, with five hundred soldiers and one hundred men under Don Diego d'Azambuja, to El Mina. At El Mina, a Portuguese *lançado*, De Barros, acted as interpreter⁴⁸⁸ between d'Azambuja and King Ansa, ruler of the area.

D'Azambuja addressed King Ansa and said that the King of Portugal, in appreciation of the hospitality shown to his subjects by King Ansa, sought permission to build a fort and a church. King Ansa refused to grant permission, saying that the two cultures were too far apart to live in peaceful proximity with each other, for "The sea and land, being always neighbours, are continually at variance, and contending who shall give way...."⁴⁸⁹ D'Azambuja then threatened to commit suicide rather than return to Portugal without having built the fort. Suicide being seen as utterly repugnant, even in present day Ghana, King Ansa reluctantly granted permission for the fort to be built. And thus began a permanent European presence in the Gold Coast.

The Portuguese had a monopoly of the lucrative gold trade from the Gold Coast until Henry VIII quarrelled with the Pope and began to disobey the papal bull granting the Guinea Coast to the Portuguese. However, Portuguese jurisdiction did not extend beyond the coast-line

⁴⁸⁷ Mensah Sarbah; *Fanti National Constitution*, 1906, p. 55. Hereafter cited as Mensah Sarbah.

⁴⁸⁸ *ibid*, at p. 56.

⁴⁸⁹ *ibid*, at p. 61.

where their forts and settlements were⁴⁹⁰.

In 1637, El Mina fell to the Dutch, who formed an alliance with the local ruler to drive out the Portuguese⁴⁹¹. Soon more Europeans joined in the gold rush. The British concluded a series of secret treaties with local rulers, who agreed to transfer trade from the Dutch to the British⁴⁹².

The Swedes, emerging from the Thirty Years' War with a new sense of pride, sent an expedition to the Gold Coast in 1652. They built lodges at Takoradi, Osu (near Accra) and a castle at Cape Coast⁴⁹³. In 1657, the Swedes were driven out by the Danes, thus putting a permanent end to Swedish presence on the Gold Coast. The Danes proceeded to build several settlements and a luxurious castle (Christiansborg) at Osu, which came to be inherited by successive governors of the Gold Coast and is still the residence of the Head of State of Ghana.

In 1662, the English trade with the Gold Coast was made a priority and a company called the Company of Royal Adventurers of England Trading to Africa, was formed for the purpose. Among its subscribers was James, Duke of York, later, King James II. Thus, the new company came to be close to the Government of the day⁴⁹⁴. The company lost no time in building a castle at Cape Coast and lodges all over the coast-line.

A bitter struggle ensued among the European powers on the Gold Coast for control over the gold trade. In 1672, after a severe setback for the British, a new company, the Royal Africa Company was formed, with very little capital. In the end it was the slave trade which saved the company from bankruptcy⁴⁹⁵.

As regards jurisdiction of the European settlements, the practice had been that the law of the

⁴⁹⁰ *ibid*, at p. 71.

⁴⁹¹ Mensah Sarbah, p. 72.

⁴⁹² *ibid*, at p. 73.

⁴⁹³ Ward, W. E. F; *History of the Gold Coast*, 1948, p. 75. Hereafter cited as Ward.

⁴⁹⁴ *ibid*, at p. 77.

European countries did not extend beyond the fort or castle. In 1821, a new British Governor, Sir Charles Macarthy, was sent to the Gold Coast to keep law and order in the settlements. Macarthy promptly set about establishing petty debts courts at the Cape Coast Castle and other trading settlements⁴⁹⁶. He selected the best qualified local merchants as magistrates and although the courts had jurisdiction only within the settlements, these magistrates did not hesitate to try any case, civil or criminal, which was brought before them and whether or not the matter arose within or without the settlement⁴⁹⁷. The courts were frequently used by the local people who brought cases against merchants. Thus, for the first time, English law began to apply in limited circumstances, to both Europeans and locals but only within the settlements.

Unlike the Upper Guinea Coast, the Europeans did not live among the Africans. There were no settled *Lançados* or *Tangomaos*. African traders brought their goods to the coast themselves, without the need of middlemen. It appears that even in the settlements, "...exclusive jurisdiction to any civil or criminal case was never vested in the white man, nor did the people grant such powers"⁴⁹⁸. Thus, the only way English law could exclusively govern an issue was for the party or parties to go to England, or be sent there in criminal cases. "In the castle near the great gate was a dungeon for the confinement of murderers, traitors and other such-like criminals until they could be conveniently sent to England for their trial"⁴⁹⁹.

Clearly matters were unsatisfactory for the British traders and in 1874 the Gold Coast colony was declared. However, the declaration of colonialism did not bring with it the full establishment of the English legal system. There were several reasons for this. Unlike French colonialism, British rule in West Africa was established largely through treaties and agreements with local chiefs and kings. These agreements usually stipulated that the laws and customs of the African parties should be fully recognised. This recognition was

⁴⁹⁵ *ibid*, at p. 81.

⁴⁹⁶ Mensah Sarbah, p. 77.

⁴⁹⁷ Ward, p. 77.

⁴⁹⁸ Mensah Sarbah, p. 83.

⁴⁹⁹ *ibid*, at p. 84.

incorporated into the Orders in Council which laid down the ground rules for the administration of the colonies. The Orders specifically instructed the British legislator and the judiciary to accept the operation of "native law and custom" where they were not repugnant to "natural justice, equity and good conscience".⁵⁰⁰ An Order in Council issued in 1844 provided that the judges were to "... observe until further Order such of the local customs of the said countries and places as may be compatible with the principles of the law of England and in default of such customs shall proceed in all things as nearly as may be according to the said law of England"⁵⁰¹.

II. Application of Local (Customary) Law

The British colonial administration endeavoured, since the declaration of the colony, "...to exercise British rule through, rather than in spite of, the Chiefs and the Chiefs were to be made to enforce central decisions"⁵⁰². D. Chalmers, the Chief Magistrate in the Gold Coast, was asked to devise a comprehensive scheme for "utilizing, regulating and controlling the power of the Chiefs".⁵⁰³ He advised that the system of Chiefs was the "best foundation on which to build and advocated that the most reliable Chiefs should be directly recognised, paid a stipend and to have their own courts of first instance"⁵⁰⁴. Thus began what was later to be called, "Indirect Rule".

Allott gives two reasons for the continued application of local customary legal systems in Africa. The British, according to him, had the desire to preserve tranquillity by leaving the inhabitants under "...the existing and familiar customary law"⁵⁰⁵. Secondly, the British felt that "British law was too sophisticated to be administrable to primitive populations living by the hoe and not knowing the use of writing"⁵⁰⁶.

⁵⁰⁰ Allott, at p. 13.

⁵⁰¹ Jurisdiction Order in Council 1844.

⁵⁰² Kimble, David; *A Political History of Ghana 1850 – 1928*, 1963, p. 457.
Cited hereafter as Kimble.

⁵⁰³ *ibid*, at p. 459.

⁵⁰⁴ *ibid*, at p. 459.

⁵⁰⁵ Allott, at p.12.

⁵⁰⁶ *ibid*, at p.13.

Some of Allott's views, expressed above, do not seem to conform to the history of British colonial policy in West Africa. Before the Gold Coast Colony was declared in 1874, the British Government had agreed with the coastal Chiefs in the Bond of 1844, to treat "...the States as independent authorities over whom control could only be secured by their individual agreement"⁵⁰⁷. Thus, the various kingdoms over which the Chiefs ruled were recognised as States, with their own judicial systems. In 1877, the Governor, S. Freeling directed that it was not only a matter of policy but also of justice "...to effect reforms by as slight disruption of long-cherished powers and customs as possible"⁵⁰⁸. The introduction of the Supreme Court Ordinance in 1876 however, created difficulties, for here were Chiefs being called upon to understand the common law, an alien system, in addition to applying their own legal systems. Chalmers suggested a way out by asking the Government to appoint a clerk to each Chief and if the Chief was young, to be taught to read and write in his own language⁵⁰⁹. This policy greatly enhanced the literacy levels of the Gold Coast aristocracy and to this day, a person would not, as a policy, be elected Chief by the community unless he were well-educated.

To implement these recommendations, the Native Jurisdiction Ordinance was enacted in 1878. It provided that the Kings were now to be called Head-Chiefs. The Head-Chiefs were to make by-laws on a range of subjects. More controversial still, the Government now had the power to dismiss a Chief⁵¹⁰. The Chiefs and their subjects objected to the Ordinance which seemed to suggest that not only were the Chiefs the agents of the British Government but also that the Government was the source of the Chiefs' authority. The Colonial Office made it plain to the Gold Coast administration that it had no intention of

"...entering upon a crusade to reform customs, or to abolish the power of Chiefs simply because they might not always administer justice in accordance with English ideas. In some respects, they should even be strengthened, since the Government

⁵⁰⁷ Hailey, Lord; *Native Administration in the British African Territories*, 1951, p. 201.

⁵⁰⁸ Dispatch No. 143 of 29 May 1877 from Freeling to Carnarvon: CO/96/121.

⁵⁰⁹ Letter of 6 June 1972 from Chalmers to Pope Hennessy. Cited in Kimble, p. 459.

⁵¹⁰ Kimble, p. 460.

was not in a position to substitute its authority in the inaccessible wilds and impenetrable forests of the interior”⁵¹¹.

Thus, the Chiefs were seen as better placed to administer the colony as agents of the Government. Not only was it cheaper that way but also because the Government lacked the personnel to take up these positions. Nevertheless, since “indirect rule” had never been implemented before, the Colonial Office was not certain whether the Gold Coast was to be governed through the Chiefs with only general supervision and control, or whether there should be some Government representation throughout the country. The Native Jurisdiction Ordinance 1878 was never implemented.

The Governor, Sir Samuel Rowe, was categorical. “I think the proper way to administer the Gold Coast Colony is by acting through the Chiefs”⁵¹². In the Governor’s view, the Chiefs were the most respectable persons in the community and the “...expression of the native mind in favour of social order and the rights of property”⁵¹³. By now, Chalmers’ policy of educating the Chiefs on the European model had begun to bear fruit and a good number of Chiefs had achieved appreciable levels of education⁵¹⁴.

III. Native Jurisdiction Ordinance 1883⁵¹⁵

On the Governor’s insistence, the Native Jurisdiction Ordinance 1878 was repealed and replaced with a new Native Jurisdiction Ordinance 1883. It provided for native courts to be established, administered by the Chiefs but with appeal to the High Court. Thus, the Chiefs were not only called upon to deliver judgments they could legally support, they also had to understand the common law system to which appeals from their courts were to go. The Ordinance was criticised from all quarters, from some educated Africans who were

⁵¹¹ Minute of 9 March 1880 by A.W.L. Hemming; Cited in Kimble, p. 461.

⁵¹² Letter of 31 Aug. 1882, from Rowe to Colonial Office; CO/96/147.

⁵¹³ *ibid.*

⁵¹⁴ Kimble, p. 462.

⁵¹⁵ No. 5.

expecting to be appointed magistrates if the native courts were not manned by Chiefs⁵¹⁶, from some of the Chiefs themselves and from the press at Cape Coast, from which the Governor received much abuse⁵¹⁷.

One of the positive developments from the controversy was that many educated Africans, especially the lawyers, began to take serious interest in their institutions, the nature and position of Chiefs in the community. Books and articles began to appear on indigenous constitutional law and legal institutions. One example was Mensah Sarbah, who not only wrote books on Fanti constitution and law but also compiled case law⁵¹⁸. These educated Africans now rallied to the support of the Chiefs and began to resist interference from the Colonial Government. They argued that the Governor should not have the power to dismiss Chiefs without referring the matter to the Oman Council (the peoples' council).

The mixed support given the Ordinance continued throughout its existence. The subjects of the Chiefs also mounted opposition, especially to some of the punishments which Chiefs were permitted to impose, such as imprisonment. In *Oppon v Ackinnie*⁵¹⁹ it was argued that the Supreme Court Ordinance 1876 had curtailed the judicial powers of the Chiefs in the Protected Territories and that the Chiefs had no power to imprison their subjects. The Full Court of the Gold Coast rejected these arguments and held that the Supreme Court Ordinance did not impair the judicial powers of the Chiefs and that they had power to imprison their subjects.

⁵¹⁶ One interesting letter of protest came from J. Renner Maxwell, the first African from the Gold Coast to be called to Bar. He wrote to the Secretary of State, saying that he considered himself emancipated from the jurisdiction of uneducated Chiefs and was sad to see that the Ordinance preferred "Ignorance and Barbarism to Education and Civilisation". He was particularly worried that "...my own cook is a son-in-law and captain to the Chief of the district in which I live, and if the Ordinance is ever made to apply to Cape Coast, which I pray God and your Lordship will forbid, I may become the victim of a great deal of annoyance from my own cook". Letter of 23 Aug. 1883, from Renner Maxwell to Secretary of State enclosed in Dispatch No. 420 of 4 Dec. 1883, from Rowe to Derby; CO/96/153.

⁵¹⁷ Kimble, p. 463.

⁵¹⁸ See Bibliography.

⁵¹⁹ 1887, Reported in Mensah Sarbah; *Fanti Customary Law*, 2nd Ed. 1904, pp. 37 – 38.

Opposition to the Chiefs' jurisdiction over customary law did not end there. The Acting Queen's Advocate W. Brandford Griffith jun. had a singular hatred for native courts and called for their replacement by the District Commissioner's Court⁵²⁰. However, London took the practical view that the colony could not afford either the District Commissioners or the police necessary to keep "...the people of the interior in hand, clear the roads, and to prevent slavery"⁵²¹. There was no hope of performing all these functions if the Chiefs were not respected by their subjects, therefore they must retain the power to fine and imprison⁵²². The controversy now saw the educated Africans solidly behind the Chiefs. Mensah Sarbah, in his book *Fanti National Constitution*⁵²³, repeated the argument made by the Chiefs that the Gold Coast had not been conquered and that British jurisdiction and influence had only been acquired by treaties with the existing State Governments which had their own rights of sovereignty.

The controversy continued throughout the colonial period but the Ordinance remained in force until 1927 and by it "...the administration of justice by the Chiefs gradually became interwoven with the English system"⁵²⁴.

IV. Choice of Law in the Gold Coast

In 1874, the Imperial Charter of July 24 1874 established the Gold Coast Legislation Council. This Council was to become the Government of the future colony. Two years later, the Council declared the Gold Coast Colony and proceeded to enact a new Ordinance, the Supreme Court Ordinance of 1876⁵²⁵. The purpose of the new Supreme Court Ordinance was

"...to fuse the jurisdictions of the different territories under British administration or

⁵²⁰ Kimble, p. 464.

⁵²¹ Memorandum of 22 Jan. 1888 by Acting Colonial Secretary. Cited in Kimble, p. 464.

⁵²² *ibid.*

⁵²³ 1906, Chapter iii.

⁵²⁴ Kimble, p. 463.

⁵²⁵ No. 4 of 1876.

protection; these were the Chief Magistrate's Court at Accra, the Chief Magistrate's Court at Lagos, and the Judicial Assessor's Court exercising in the Gold Coast 'Protectorate'⁵²⁶.

The direction to the court as to the application of the common law and customary law was contained in Section 19 of the Ordinance. It provided as follows:

"Application of Native Laws and Customs

19. Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any law or custom existing in the Colony, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the Colonial Legislature existing at the commencement of this Ordinance, or which may afterwards come into operation. Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives of the Colony, and particularly, but without derogating from their application in other cases, in causes and matters relating to marriage and to the tenure and transfer of real and personal property, and to inheritance and testamentary disposition, and also in causes and matters between natives and Europeans where it may appear to the Court that substantial injustice would be done to either party by strict adherence to the rules of English law. No party shall be entitled to claim the benefit of any local law or custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be regulated exclusively by English law: and in cases where no express rule is applicable to the matter in controversy, the Court shall be governed by the principles of justice, equity, and good conscience"⁵²⁷.

⁵²⁶ Allott, p. 123.

⁵²⁷ Full text in Allott, p. 123.

Section 19 was widely popular in the British colonies and as Allot observes, it was "taken over in the Colony of Lagos, and later in the colony and protectorate of Nigeria"⁵²⁸. It was again re-enacted in the Courts Ordinance of 1935 as Section 74 (1).

The section was also adopted by the Protectorate Courts Jurisdiction Ordinance of Sierra Leone⁵²⁹ and reproduced in the Courts Act of 1965⁵³⁰. Section 19's popularity did not end in West Africa. It was introduced into North-Eastern Rhodesia by the High Court Procedure Regulations of 1904⁵³¹, with the alteration that 'customary law' was to apply only if it was not "repugnant to natural justice, equity and *good government*"⁵³². The provision was extended, with its alteration, to the Colony of Northern Rhodesia. Section 19 thus became the basis of choice of law in the British colonies of the Gold Coast, Nigeria and Sierra Leone, and parts of Eastern and Central Africa⁵³³.

It is at once noticeable that the Gold Coast provision applied only to the Supreme Court, excluding the 'native courts'. In the Gold Coast, this was rectified by Section 74 (1) of the Courts Ordinance of 1935⁵³⁴, which now provided in its opening words that "Nothing in this Ordinance shall deprive the Courts...." Prior to 1935, a local court was not obliged to examine the possibility that a law other than the *lex fori* could apply. But on appeal, it is just possible that the parties might be faced with the possibility that a hitherto unknown legal system governed the issue(s). "Native Law" may have applied in the first instance, while on appeal, Section 19 could have provided for the application of either the "customary law" of another ethnic unit or the common law⁵³⁵.

The popularity of Section 19 may lie in the opening sentence of the provision. "Nothing in

⁵²⁸ Allott, p. 124.

⁵²⁹ No. 6 of 1903.

⁵³⁰ As Section 76, No. 31 of 1965. See Allott, p. 124.

⁵³¹ No.4 of 1904.

⁵³² Regulation 8. Allott, p. 124. (Emphasis added).

⁵³³ There is no indication that the section was extended to the Gambia but it is unlikely that the Gambia was exempt from the application of Section 19.

⁵³⁴ Allott, p. 126.

this Ordinance shall deprive the Supreme Court...or shall deprive any person of the benefit, of any law or custom existing in the Colony." The opening sentence is important for three major reasons.

First, Section 19 would seem to override any provision in the Ordinance or elsewhere, which purported to prohibit the application of local law.

Second, the application of local law is seen as a 'right' of the court which may not be taken away.

Third, there is no reason to suggest that the term 'any person' does not mean what it says and therefore the racial factor, which was crucial in French colonial legislation, is removed. This view is strengthened by the provision that local law is to apply in cases between an African and a European, where it may appear to the court that substantial injustice may otherwise be done to *either* party⁵³⁶.

The only express exclusion of local law is the provision that local law is to be excluded where there is a prior agreement between the parties to do so or where the nature of the transaction is such as to call for its exclusion⁵³⁷. This does not appear to depart from the normal procedure of the court, to examine the nature of a transaction in order to arrive at the proper law which should govern the transaction. This provision seems to emphasise further the view that the court is bound to consider applying local law and to reject it only on well-established grounds.

The significance of the provision is that the choice of law process was permitted to cover a whole range of African legal systems and the Common Law. Section 19 may have contributed to the rapid growth of jurisprudence in West Africa and must have been useful during the period of "indirect rule" which was to follow.

⁵³⁵ Allott, p. 126.

⁵³⁶ Allott's emphasis; *New Essays in African Law*, at p. 128.

⁵³⁷ Allott, p. 129.

V. Choice of Law under Section 19 of the Supreme Court Ordinance

Section 19 did not provide specific choice of law rules for the application of customary law. It merely guided the court to investigate the nature of the transaction or claim to decide whether customary law applied. However, certain general presumptions were made by the court:

a) that an African was *prima facie* presumed to be governed in his personal relations by customary law. This presumption could be rebutted if the person was able to show that some other law was applicable. If the transaction was between an African and a non-African, the general common law was to apply unless substantial injustice would be done by the strict adherence to the common law⁵³⁸.

b) If both parties belonged to the same ethnic group, it would be far more difficult to show that some law other than that which applied to both of them prevailed, for example, where two Europeans purport to conclude a contract governed by customary law. Where commercial transactions are concerned, however, it was common for two Africans of the same ethnic group to enter into a contract governed by the common law, as long as existing customary rights of third parties were not infringed upon. For example, where the parties enter into a contract governed by the common law, to sell land in which customary law rights of third parties were involved⁵³⁹.

(a) Bilateral Relations

Allott has identified a number of issues arising from "Marriage" mentioned in Section 19⁵⁴⁰, which he discusses into some detail. One may point out that "Marriage" was excluded in the

⁵³⁸ *Koney v UTC* (1934) 2 W. A. C. A 188.

⁵³⁹ *ibid.*

Courts Ordinance 1935. Nevertheless, marriage operated as an essential issue before 1935. The rest of the areas discussed by Allott are, Land⁵⁴¹ and unilateral transactions⁵⁴².

The choice of law difficulty which the courts faced under Section 19 of the Ordinance when determining cases on bilateral relations was whether the mode of transaction determined the law which governed the relationship. If an African married according to the Marriage Ordinance, did all his matrimonial rights come to be governed by the common law or by his personal customary law? Or was it only certain aspects of the marriage which were governed by the common law, such as capacity or validity of the marriage⁵⁴³?

The courts at first adopted the view that where an African chose to marry under the Ordinance, he must be taken to have opted out of his customary law completely. Even intestate succession would be governed by the common law. In *Cole v Cole*, Griffith J, boldly declared that "...a Christian marriage clothes the parties to such a marriage and their offspring with a station unknown to native law"⁵⁴⁴.

This was a harsh position to take in view of the fact that Christianity is not equipped with a legal system which could be said to have replaced customary law. The *lex loci celebrationis* can only regulate the formalities and validity of the marriage but to apply it to all aspects of the personal lives of the parties, and their children, is untenable. Slowly the courts began to soften their stand and by 1924, Van der Meulen, J, was able to state in the Nigerian case of *Smith v Smith* that:

"It would be quite incorrect to say that the persons who embrace the Christian faith or who are married in accordance with its tenets, have in other respects attained that stage of culture and development as to make it just or reasonable to suppose that their whole lives should be regulated in accordance with English laws and

⁵⁴⁰ Allott, pp 216 - 217.

⁵⁴¹ Allott, pp - 237 - 240.

⁵⁴² *ibid*, pp - 240 - 241.

⁵⁴³ Allot. P. 217.

⁵⁴⁴ (1898) 1 N. L. R, 15, at p. 22. Cited in Allott, p. 217.

procedures”⁵⁴⁵.

Apart from the colourful and patronising language used in the judgment, the decision was correct in classifying the *lex loci celebrationis* as regulating only certain aspects of the marriage, such as formality, and nothing else.

In the Gold Coast, the courts never expressed themselves that clearly until the Ghana case of *Coleman v Shang*⁵⁴⁶, where the Ghana Court of Appeal held that:

“We are of the opinion that a person subject to customary law who marries under the Marriage Ordinance does not cease to be a native subject to customary law by reason only of his contracting that marriage. The customary law will be applied to him in all matters, save and except those generally excluded by the statute, and any other matters which are necessary consequences of the marriage under the Ordinance....⁵⁴⁷”

It would seem, therefore, that the legal consequences of a person subject to customary law but who marries under the Marriage Ordinance are these⁵⁴⁸:

- i) he is still subject to his customary law except in cases where legislation prescribes a different law;
- ii) he is debarred from taking another wife if the criminal code says so, as in *R. v Batholomew Princewell*⁵⁴⁹, where the accused married under the Ordinance but subsequently converted to Islam. The court held that a person who marries under the Ordinance cannot later claim the prerogative of Islam to take other wives, simply by

⁵⁴⁵ (1924) 5 N. L. R, 102. Cited in Allott, p. 218.

⁵⁴⁶ (1959) G. L. R 390; [1961] A.C. 481, at 501. Confirmed on appeal to Privy Council [1961] AC 481. Cited in Allott, p. 218.

⁵⁴⁷ (1959) G. L. R. 390, at p. 401. Full text in Allott, pp 218 - 219.

⁵⁴⁸ Allott raises seven issues which he discusses at some length, however, only points (1) to (5) are of relevant to this study.

⁵⁴⁹ (1963) N. N. L. R, 54.

converting to Islam. One must remark however, that in *R.vBatholomew Princewell* the accused was charged with bigamy under the criminal law of Nigeria at the time. It is not certain how far the case establishes a general rule in conflict of laws.

iii) the right of the spouses to divorce each other must be based on the Marriage Ordinance and not on customary law: *Akwapim v Budu*⁵⁵⁰;

iv) the husband abandons the customary law right to sue a third party for compensation for committing adultery with his wife. The remedy for adultery must be based solely on the Ordinance⁵⁵¹;

v) it would seem that property rights of the spouses are not affected by the Marriage Ordinance and continue to be governed by customary law, unless there is an agreement between the parties to the contrary. The Sierra Leone Christian Marriage Act⁵⁵² stated that;

" A marriage celebrated under this Act to which one of the parties is a native should not have any effect on the property of such native....The properties of parties to a marriage celebrated under this Act shall, if both be natives, be subject in all respects to the laws and customs of the tribe or tribes to which the parties respectively belong."

It appears that the English Married Women's Property Acts were not received into domestic general law and therefore each married party continued to enjoy rights already accruing under the respective customary law. In post-independent Ghana and Nigeria, local versions of the Married Women's Property Acts were passed but did not have the effect the English version had⁵⁵³. According to Ollenu, "...except in so far as limitations or restrictions imposed by a statute are concerned, a Ghanaian woman's rights are in no way affected by her marriage under the Marriage Ordinance...." The Married Women's Property Ordinance

⁵⁵⁰ (1935) D. Ct. '31 – '37, p. 89. Cited in Allot footnote 15.

⁵⁵¹ Obiter in *Coleman v Shang*, (1959) G. L. R. 390. Allott, footnote 14.

⁵⁵² Cap. 95, S.26. Cited in Allott, p. 220.

⁵⁵³ Allott, p. 221.

1890 was enacted "out of extra caution and...more especially for the benefit of non-Ghanaian women"⁵⁵⁴.

There are no decided cases on the issue to indicate whether Ollenu is correct in his interpretation but it is not clear why married non-Ghanaian women needed this protection in Ghana. Possibly Ollenu is addressing the case where, for example, an Englishwoman married a Ghanaian subject to the matrilineal legal system of succession and thereby acquired his domicile of dependence, which would have deprived her of a share in his property in case of divorce or his death.

(b) Breach of Promise

In customary law, a breach of promise occurs where a man promises to marry a woman and thereafter refuses to marry the woman or places himself in such a situation that it would be illegal for him to proceed with the marriage. What cause of action, if any, is open to the woman? To start with, it would seem that the action may be brought either under the general English law of contract or under customary law⁵⁵⁵. The post-independence Ghana law is clear on the subject. Rule 2 of the Courts Act 1960⁵⁵⁶ provides that the agreement of the parties determines an issue arising out of the transaction and transaction includes a marriage agreement or arrangement to marry.

The usual cases of breach of promise are instances where a man performs a customary law marriage with a promise to convert it into a statutory marriage but before then, marries a second wife, thus making it impossible for him to marry under the Ordinance. In such a case, the court usually held that there was no breach of promise, since a marriage did take

⁵⁵⁴ *The Law of Testate and Intestate Succession in Ghana*, 1966, p. 288. Married Women's Property Ordinance 1890, Cap. 131, 1951 Revision. Cited in Allott, p. 121.

⁵⁵⁵ Allott, p. 227.

⁵⁵⁶ C. A. 9, Section 66.

place⁵⁵⁷. Where however, the promise to convert the customary law marriage into an Ordinance marriage was made *after* the customary law marriage, it was held that there was a breach of promise. In *Appiah and Acheampong v Acheampong*⁵⁵⁸, the High Court said that the wife was entitled to sue the husband because the incidents of the two marriages were different.

(C) Capacity of Non-Africans to enter into Customary Marriage

The standard position taken by the courts was that a non-native could not enter into a customary law marriage. In the leading case of *Savage v Macfoy*⁵⁵⁹, it was held that because the late Macfoy was born in Freetown, Sierra Leone and was classed there as a non-native, he lacked the capacity to marry according to Yoruba law. It is correct to say that the law of domicile governs capacity of the parties to the marriage. However, the court had accepted that Macfoy had made Lagos his domicile of choice. Nevertheless;

"The mere fact of Macfoy having made Lagos his domicile of choice would not necessarily make him subject to or given the benefit of native law and custom, and his ordinary relations would be governed by English law and not by native law...."

One would have thought that when a domicile of choice was acquired, then the person also became subject to the law of the new place of domicile as his or her connecting factor in personal matters but it appears the English domicile of origin was not to be easily overturned.

In the earlier case of *Re Bethell*⁵⁶⁰ the validity of Bethell's marriage to a Tswana woman according to Tswana law and custom was raised in the Chancery Division as regards succession under English law. Stirling J held that Bethell's marriage under the local law was valid. The learned judge took several circumstances into consideration. For example that;

a) the parties lived together as man and wife in Tswana country;

⁵⁵⁷ *Jones v Mends*, (1872) Sar. F. C. L. 128. See Allott, p. 230.

⁵⁵⁸ (1967) C. C. 59. Allott, p. 230.

⁵⁵⁹ (1909) Ren. 504. Full text in Allott, p. 233.

⁵⁶⁰ (1888) 38 Ch. D. 220. See Allott, p. 233.

- b) Bethell refused to marry in church although one was available to him at Kimberley;
- c) Bethell declared that he was a Tswana and wished to marry according to Tswana custom and law.

The judge ruled that on those facts, there was a valid Tswana marriage even though Bethell had retained his English domicil of origin. In England though, the judge continued, such a marriage would not be recognised as it was essentially different from a Christian marriage.

The ruling is unsatisfactory, for if Bethell retained his domicil of origin then he clearly lacked capacity to enter into a potentially polygamous marriage. If however he had capacity to marry under Tswana law, then he must have acquired a domicil of choice in Tswana country. The marriage is clearly valid under the *lex loci celebrationis*, Tswana law, as the local legal system appears to have accepted Bethell as one of the community and therefore not lacking capacity to marry under the local law. The view that a foreign marriage conducted under a system that differed from the Christian could not be recognised in England is untenable. While the Anglican Church may be the established church, Christianity itself is not a state religion in England and there is no legal requirement that a marriage must conform to Christian rituals in order to be recognised as valid.

From the two cases above, it would seem that;

- a) possibly a domiciled African from other parts of Africa could marry validly under the local customary law;
- b) a resident non-African, though having acquired a domicile of choice, lacked the capacity to marry under customary law.

The decisions in the two cases are difficult to sustain in law. There is no rule of law which restricts the rights of a non-African making his home in an African country, and where his intentions of acquiring a domicil of choice are clear, legal effect should be given to that choice. Section 19 did not introduce a racial element which could justify the decisions. Indeed Section 19 had been quite progressive for its time. It referred to "any person" who

could not be deprived of the benefit of customary law and that customary law should apply to the parties, if it would cause "substantial injustice" to the parties to apply a law other than customary law.

In the case of the Gold Coast (Ghana), not until 1956 did the courts rule that anyone residing in the country could be subject to customary law. In *Adjei and Dua v Ripley*⁵⁶¹, the court ruled that a non-African could be liable under the customary law for the customary tort of seduction. In that case, Smith, Ag. J, (himself an Englishman), said concerning a European standing trial for the customary tort of seduction:

"There is a customary law in this country that a father maintains his child. That is in effect the common law of this country....I should be particularly reluctant to subscribe to the view that in one country one law should exist for one man and a different law for another, merely on a question of race. To hold so would be a retrogressive step for the law and the principles of natural justice."

It is submitted that this is the correct approach to the interpretation of Section 19. It is unfortunate that it took so long to be applied.

VI. Choice of Law in Eastern and Southern Africa

(a) Historical Introduction

The history of Eastern and Southern Africa differs in many ways from that of West Africa. While the British, the French and even the Germans had no intention of settling permanently in West Africa, European settlement in Eastern and Southern Africa was a policy from the start. This portion of the study will exclude what is now the Republic of South Africa, as political and historical activity in that part of Africa is too vast and much too complex for the purpose of this research.

⁵⁶¹ (1956) 1 W. A. L. R. 62. See Allott, p. 235.

By the 1880s, South Africa had already witnessed an organised white settlement. In 1893 Cecil Rhodes' British South Africa Company (BSA) moved north from South Africa to provoke a war with Lobengula, King of the Matabele⁵⁶². White participants in the war were granted land by BSA on a lavish scale and were additionally rewarded with mineral claims⁵⁶³. The indigenous population was moved to settlements set aside for them⁵⁶⁴.

In 1891, the Colonial Office in London accepted the protests of missionaries against BSA taking over control of Nyasaland (Malawi) and the British Central African Protectorate was declared by the Colonial Office over the area⁵⁶⁵ but Northern Rhodesia remained BSA territory.

(b) German Colonies

After the Berlin Conference of 1884, the Germans laid formal claim to four territories where they already had trading links: Togo and Cameroon in West Africa, Tanganyika (Tanzania) and German South-West Africa (Namibia). German colonies were thus scattered all over Africa and except for Togo, German colonial policy was similar in all the other colonies. There is no need therefore to analyse them on a regional basis as has been done with British colonies.

In Togo, the Germans simply copied the British policy of indirect rule which was in operation across the border in neighbouring Gold Coast⁵⁶⁶. It was the only German colony which did not have *schutztruppe* (protection troops) and the Germans relied heavily on existing local administrative structures. The ratio of Europeans to Africans in Togo was 1:11,000 compared to 1:4,000 in the French mandated part of Togo after the First World

⁵⁶² Cambridge History of Africa, Vol. 6, c.1870 – c.1905, p. 445.

⁵⁶³ *ibid*, at p. 446.

⁵⁶⁴ *ibid*, at p. 446.

⁵⁶⁵ *ibid*, at p. 448.

⁵⁶⁶ Gann and Duignan; *The Rulers of German Africa, 1884 – 1914*, 1977, pp. 77 – 81. Hereafter cited as Gann and Duignan.

War⁵⁶⁷. The reasons for this may be due to the fact that the Togolese and the people of the Gold Coast share the same cultures, social structures and similar language and the Togolese would have objected if the Germans had introduced a system different from that in the Gold Coast. Second, the Togolese had been trading with the British and the Germans prior to the declaration of colony and both parties knew each other well. Third, the Germans must have realised how much cheaper it was to apply the British type of indirect rule to a colony they had no intention to settle.

The development of indirect rule in Togo owed much to Count Julius von Zech auf Neuhausen, who was Governor of Togo from 1903 to about 1910. The whole of Togo was divided into five administrative districts (*Bezirksämter*), each with a few sub-districts⁵⁶⁸. A great deal therefore depended on the district commissioner and the support he received from the local chiefs. According to Gann and Duignan,

“...Togolese chiefs were more than tolerated; their judicial powers were recognised. Zech pioneered the study of African legal institutions in Togo and instructed his district commissioners to study them in a systematic fashion”⁵⁶⁹.

The local court, consisting of a chief, assisted by several co-adjudicators, were permitted to settle civil and minor criminal cases and could impose fines of up to one hundred marks. All those cases were tried according to the local law but, as in the Gold Coast, appeals were allowed to the European type of higher court⁵⁷⁰. There appears to have been an equivalent of the repugnancy rule, though not properly articulated, but it forbade the infliction of inhuman punishment and evidence obtained through poison, torture or similar means was inadmissible⁵⁷¹. Von Zech however had difficulties implementing indirect rule. Unlike British colonies, German colonies were not permitted to raise their own revenue and were

⁵⁶⁷ Gann and Duignan, p. 80.

⁵⁶⁸ *ibid*, at p. 80.

⁵⁶⁹ *ibid*, at p. 82.

⁵⁷⁰ *ibid*, at p. 82.

⁵⁷¹ *ibid*, at p. 82.

thus at the mercy of central government in Berlin⁵⁷².

In the rest of the three colonies, German rule was very direct and there was no recognition of local legal systems⁵⁷³. German governors had a small staff to get by and one would have thought that the expansion of indirect rule would have been useful. By 1900, the entire colonial administration in the four colonies comprised of nine senior judges (*Oberrichter*) and senior secretaries (*Erste Refernten*) and nineteen district commissioners (*Bezirksamtmänner*)⁵⁷⁴. With such acute shortage of personnel, the Germans "...imposed direct rule of the most autocratic kind..."⁵⁷⁵, not only in South-West Africa but also in East Africa and Cameroon. A district commissioner had enormous powers. He controlled the troops and police, he was judge and head of the executive. Appeals of his decisions were allowed only to the Governor himself and few such appeals were ever made⁵⁷⁶.

With such a heavy workload, it is not surprising that a large amount of work devolved on junior officers, including police sergeants in charge of sub-stations⁵⁷⁷. Thus, a police sergeant could, on his own authority, sentence a criminal to two months in prison or to twenty-five lashes⁵⁷⁸. District officers had extensive judicial powers which were open to abuse. When the British took over German East Africa at the end of the First World War, they found, to their amazement, that at one police station (Moshi police station), the sergeant had tried 348 Africans within nine months. Of these, 283 were flogged⁵⁷⁹. They also found, for example, that in 1909, the judge in charge of "native cases" at Dar es Salaam, tried on average, seventeen cases a day, giving each case about 12 minutes⁵⁸⁰.

An attempt to examine the choice of law process in the German colonies has been found to be a futile exercise. Even in Togo, where indirect rule was practised, there are no records on

⁵⁷² *ibid*, at p. 83.

⁵⁷³ This narrative is based on Gann and Guignan, pp. 70 – 79.

⁵⁷⁴ *ibid*, at p. 70.

⁵⁷⁵ *ibid*, at p. 74.

⁵⁷⁶ *ibid*, at p. 79.

⁵⁷⁷ *ibid*, at p.102.

⁵⁷⁸ *ibid*, at p.102.

⁵⁷⁹ *ibid*, at p.102.

case law.

(c) British Eastern and Southern Africa

The British colonial administration did not introduce comprehensive legislation on choice of law as it had done in West Africa with the Courts Ordinance of 1876⁵⁸¹. The rules on choice of law were often found in the Order in Council for the territory and not in an ordinance establishing a High Court or Supreme Court for the territory, as was the case in West Africa. Northern Rhodesia (Zambia), had both systems, the provision for the application of customary law in its Order in Council⁵⁸² and the West African type in its High Court Ordinance⁵⁸³.

The major difference between the East African and the West African provisions is that the West African type of legislation went into some detail to give guidance to the court dealing with areas of law, such as contract, marriage, succession and so on. The East African type of legislation was brief and applied only if all parties were natives⁵⁸⁴.

As was the case in West Africa, it was a trading company which was granted a charter to run the territories. The British East Africa Company was granted a charter dated 3 September 1888, Article 12 of which provided as follows:

“In the administration of justice by the Company to the peoples of its territories or to any of the inhabitants thereof, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with respect to the holding, possession, transfer and disposition of lands and goods, and testate or intestate succession thereto, and marriage, divorce, and

⁵⁸⁰ *ibid*, at p.103.

⁵⁸¹ No. 4 of 1876.

⁵⁸² Northern Rhodesia Order in Council 1924, Article 36.

⁵⁸³ No.1 of 1913 (Cap. 3, 1930 Revision) S. 5.

⁵⁸⁴ See below page 143.

legitimacy, and other rights of property and personal rights”,⁵⁸⁵.

This provision did not survive when the British East Africa Company withdrew from East Africa in 1895. It is uncertain how the company’s courts interpreted the provisions as there are no reported cases during the brief period of the company’s tenure.

Administration of the East Africa Protectorate, as the area came to be called, was assumed by the British Government. In 1897, Her Majesty’s Commissioner and Consul General for the East Africa Protectorate, established native courts of two different types⁵⁸⁶. Native courts presided over by a European officer⁵⁸⁷ and native courts presided over by a native authority⁵⁸⁸. Articles 3 and 4 of the Regulations proceeded to specify the law which the two courts were to apply:

“3. The Native Courts mentioned in Article 2(a) shall, as far as practicable, be guided by the Indian Civil Procedure Code, and the Indian Penal and Criminal Procedure Codes, but both in civil and criminal cases they shall, within the Mohammedans, also be guided by, and have regard to the general principles of the law of Islam, and throughout the Protectorate be guided by, and have regard to any native laws and customs not opposed to natural morality and humanity.

“4. The native Courts mentioned in Article 2(b) shall be guided, subject to the provisions of these Regulations, by the native laws or customs existing in their respective jurisdictions”.

In 1884, the Bechuanaland (Botswana) protectorate was declared by the British Government. On 10 June 1891, Her Majesty’s High Commissioner for South Africa issued a proclamation regarding the administration of the Bechuanaland Protectorate⁵⁸⁹. Where the courts of resident commissioners, assistant commissioners and magistrates exercise

⁵⁸⁵ Allott, p. 130.

⁵⁸⁶ The Native Courts Regulations 1897. Hertslet; *Map of Africa by Treaties*, 1896, Vol. 20, p. 74.

⁵⁸⁷ Article 2 (a).

⁵⁸⁸ Article 2 (b).

jurisdiction in cases between natives, Section 9 of the Proclamation was to apply. It provided that:

“In every matter wherein by consent jurisdiction is exercised by any such Court under the last preceding section of this Proclamation, the decision shall follow the laws and customs of the natives concerned, in so far as they are applicable: provided that if such laws or customs should be found to be incompatible with peace, order and good government, the Court may decide in accordance with the law which would regulate the decision if the matter in dispute concerned persons of European birth or descent”.

In the meantime, a new Order in Council was passed for Uganda in 1902⁵⁹⁰, Article 20 (a), which dealt with choice of law, provided the following;

“In all cases, civil and criminal, to which natives are parties, every Court shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council, Ordinance, or any regulation or rule made under any Order in Council or Ordinance”.

The Eastern and Southern African provisions were far too brief and simplistic to cater for any complicated case involving choice of law. They purported to apply to all cases, civil and criminal, in contrast to the West African provisions which applied only to civil cases. Further, the provisions applied only to cases to which natives were parties, meaning that the provisions applied only when all parties were natives. There was no room for racially mixed parties, as in the West African provisions. There seems to have been a certain lack of interest in providing genuine choice of law rules for the region.

⁵⁸⁹ Hertslet; *Map of Africa by Treaties*, 1896, Vol. 20, p. 91.

⁵⁹⁰ Uganda Order in Council, 1902.

VII. The Choice of Law Process in the Colonial Period

(a) Ethnicity

In determining which legal system might apply to the individual in the colonial period, various approaches were used. In Eastern and Southern Africa, race or ethnicity was determinant in selecting the legal system which applied to the individual. Thus, once the individual was found to be 'African', 'Asian' or 'White', a legal regime was automatically chosen for him or her and the choice of law process was determined by that legal regime. In the East African legislation, customary law could apply only if *all* parties were "natives". A native was generally a black African, to the exclusion of Asians and whites. The Tanganyika Credit to Natives (Restriction) Ordinance⁵⁹¹, for example provided in Section 2 as follows:

"In this Ordinance, the expression 'native' means any member of any African race, and includes a Swahili, but does not include a Somali or an Abyssinian".

The meaning of this provision became crucial in *Purshottam Narandas Kotak v A. Ali Abdullah*⁵⁹². In that case the respondent refused payment on three promisory notes which he had executed in favour of the appellant, arguing that the notes were in respect of a debt which was irrecoverable under the Ordinance as he was a 'native' within the definition of Section 2 of the Ordinance. The appellant replied that the respondent was an Arab and not a 'native'. The trial magistrate ruled that the respondent was a Swahili, and thus a 'native'. On appeal the court agreed with the lower court. Although there was no statutory definition of the term 'Swahili' in the Tanganyikan Ordinance, the term had been used to refer to members of a community inhabiting the coastal regions and who are of mixed Arab and African descent. The difficulty, as pointed out by Allott is that a person could be regarded as a Swahili by his community while being taken for an Arab by Arabs, since according to Arab culture, any direct descendant of the male side is Arab, no matter how racially mixed

⁵⁹¹ Cap. 75, 1947 Revision. See Allott, p. 185.

⁵⁹² (1957) E. A. 321. This case is discussed in Allott, p. 185.

he may have become⁵⁹³.

The East African cases on race were not consistent and the definitions of a 'native' were blurred throughout the colonial period. In the Kenya case of *Public Trustee v Jiwa Bin Bwana Hindi Ganeji*⁵⁹⁴, the court had to determine the combined effects of Section 2 of the Courts Ordinance 1931, which defined a 'native' as a native of Africa not of European or Asiatic extraction but including Arabs and Somalis and also any Baluchi born in Africa, and Section 2 of the Interpretation and General Provisions Ordinance⁵⁹⁵ which defined 'native' as any native of Africa not of European or Asiatic origin, but including an Arab, etc. The only difference, as Allott observes, in the two definitions is that one uses the word "extraction" while the other uses the word "origin"⁵⁹⁶. Both parties in the case were of Indian descent whose ancestors had settled on the East African coast 150 years earlier but had inter-married with local Arabs and had adopted Arabic customs. The judge ruled that the parties were of Asian "extraction" and therefore not natives within the meaning of the Ordinance of 1931.

In West Africa, these difficulties did not arise as there were practically no permanent European or non-African settlers. Nevertheless race or ethnicity did play a role from time to time in determining the law which applied to a person. The majority of these cases involved former slaves who had 'returned' to West Africa, from where their ancestors had been captured⁵⁹⁷. In *Brown v Miller*⁵⁹⁸, the Full Court of the Gold Coast held that West Indians were not Africans, despite long residence in the Gold Coast. In contrast, a West African who had left his home, willingly or not, for a prolonged period, remained a native of the region he had left. In *Re Sapara*⁵⁹⁹, the Supreme Court of Southern Nigeria held that Dr. Sapara was a 'native' within the Supreme Court Ordinance of 1876 Section 19, and therefore could claim the application of 'customary law'. Giving judgment, Osborne, J, held that:

⁵⁹³ Allott, p. 186.

⁵⁹⁴ (1932) 14 K. L. R. 117. Also discussed in Allott, p. 187.

⁵⁹⁵ 1956, No. 38. Cap. 2, 1956 Revision.

⁵⁹⁶ Allott, p. 187.

⁵⁹⁷ See for example, *Nii Azuma III v Fiscian*, (1953), 14 W. A. C. A. 287.

⁵⁹⁸ (1921) F. Ct. '20 - '21, 48, F. Ct. G.C. Discussed in Allott, p. 187.

⁵⁹⁹ (1911), Ren. 605.

“...but one’s place of birth may be an accident, and the fact that his father was an Ijesha, forcibly removed from his domicile of origin, is in my judgment sufficient to stamp Dr. Sapara with the nationality of an Ijesha...”⁶⁰⁰.

Sapara's father had been captured and sold into slavery in Sierra Leone, where Sapara had been born. Sapara managed to return to his home in Lagos and lived there for the rest of his life.

In contrast, the Supreme Court of Southern Nigeria ruled in *Savage v Macfoy*⁶⁰¹ that Macfoy, who had had been born in Sierra Leone but had settled in Lagos and went through a marriage ceremony according to Yoruba law, was not a ‘native’.

In the two Nigerian cases, it would seem that the court had applied the rigid rules of the English principle of domicile of origin, which is difficult to displace.

Where a person was of mixed race, one part African and the other non-African, colonial legislation in East and Southern Africa used to provide that such a person might qualify as an African (ie a native), if he lived in an African community observing an African mode of life⁶⁰². In *Carr v Suleman Abdel Karim*⁶⁰³ the High Court of Nyasaland held that a man whose father was Indian and mother an African, was not a ‘native’ for the purposes of the Credit Trade with Natives Ordinance⁶⁰⁴. The Ugandan courts have similarly held in *Makalasita v R*⁶⁰⁵ that the son of an Irish father and an African mother was not a ‘native’. One wonders what the decision would have been if in the two cases, the fathers had been black African and the mothers Indian and Irish. Most probably the children would have been proclaimed African.

⁶⁰⁰ At p. 606. Text in Allott, p. 188.

⁶⁰¹ (1909), Ren. 504, S. Ct., Southern Nigeria. Discussed earlier, see footnote 539?

⁶⁰² Kenya Interpretation and General Provisions Ordinance 1956, S.5 (1) (e).

Uganda Interpretation and General Clauses Ordinance, Cap.1, 1951, S.3 (1) (b).

⁶⁰³ (1929) 3 Ny. L. R. 75. Discussed in Allott, p. 188.

⁶⁰⁴ 1926, No.15.

⁶⁰⁵ (1944) 6 U. L. R. 129. Cited in Allott, p. 188.

Left to be considered is whether an African could opt out of the application of his or her customary law, either in respect of a particular transaction or from the application to him generally of customary law. Both the East and West African provisions cater for the possibility of an African opting out of customary law in respect of a "transaction" either expressly or through the "nature of the transaction"⁶⁰⁶ or "as far as practicable..."⁶⁰⁷.

Choosing a legal regime to govern a transaction is a normal procedure in private international law. However, opting out of one's domicile of origin demands a far more elaborate procedure. Under the normal rules of private international law, anyone may acquire a domicile of choice, if there is sufficient evidence to support the intention to change⁶⁰⁸. This would apply equally to an African who acquires a domicile of choice outside his or her law district. Apart from this general rule, British colonial legislation on choice of law for its West African colonies made no provision for Africans or "natives", to opt out of their customary law regimes. This is in contrast to French colonial administration in West Africa which made such provisions⁶⁰⁹.

In East Africa however, the racial element in social organisation was so strong that the need was found for such legislation. Thus in Kenya, the definition of an "African" did not include;

"...any person who, of his own motion, proves to the satisfaction of a subordinate court of first or second class –

- (i) that he is partly of non-African descent; and
- (ii) that he is not living among the members of any African tribe or community in accordance with their customary mode of life"⁶¹⁰.

⁶⁰⁶ West African provision, Supreme Court Ordinance, No.4 of 1876, Section 19.

⁶⁰⁷ East African Provision, Native Court Ordinance 1897, Articles 2(a) and 2(b).

⁶⁰⁸ *Harrison v Harrison* [1953] 1 W. L. R. 865.

⁶⁰⁹ See pages 115 - 117 above.

⁶¹⁰ The Interpretation and General Provisions Act, S.5(1) (c), Cap. 2, 1956.

In Uganda The Interpretation and General Clauses Ordinance⁶¹¹ also contained a similar provision by which a magistrate could issue a certificate exempting an African from the application of local law.

(b) Religion

African religions do not generally provide a connecting factor for their members, even though, like most legal systems, religion is a source of law. Members of African religions do not follow a special code of law and therefore present no choice of law problems to the court.

Islam, on the other hand, provided and still provides, a full legal system and a person claiming to be a Moslem, presents the court with a choice of law problem.

(c) Islam as a Connecting Factor

As illustrated in the introduction to this thesis, Islam arrived in West Africa largely through missionary activity, except for Northern Nigeria where a *Jihad* took place. The British colonial attitude to Islam was never clearly articulated unlike the French. Thus, the British saw Islam in Northern Nigeria as the religion of the Emirs or rulers, while in Zanzibar, it was approached as a State religion and elsewhere, as in Kenya, or much of West Africa, as a purely personal matter⁶¹². The British Colonial Court did not even attempt to differentiate between 'Customary Law' and the *Sharia* or Islamic Law and classified them both as 'native law and custom', even in Northern Nigeria. Most probably, this attitude was due to the visibly weak hold of Islam on West African societies.

Nevertheless, Islam, like Judaism or the Hindu religion, provides a personal law which operates until the individual changes his or her religion, and thereby automatically acquiring

⁶¹¹ Cap.1, 1951, S.3.

⁶¹² Allott, p. 204.

a new personal law. Such was the case in *Manjang v N'Dongo*⁶¹³.

Husband (H), a Christian, purported to marry W, a Moslem, according to the Sharia law in 1913. In 1933, W converted to Christianity and went through a civil law marriage with H under the Marriage Ordinance. H converted to Islam in 1954 and married a second wife according to the *Sharia*, as he was entitled to do. A few months later, W also converted, yet again, back to Islam. H died thereafter and the court had to decide who was entitled to his estate, W, W's daughter born in 1920, or the second wife?

The Mohammedan Court at Barthust (now Banjul), held that the estate be divided among the two wives, excluding the daughter, on the grounds that the 1913 'marriage' between the Christian man and a Moslem woman according to Islamic law was void both by statute law and by Islamic law. The daughter was therefore illegitimate and according to Islamic law could not inherit from her father.

On appeal, the decision was upheld. Wiseham, C.J. held that although the daughter was legitimated by the subsequent Ordinance marriage of her parents, she was a Christian and so could not succeed to the estates of a Moslem. The two wives, both being Moslem, were entitled equally.

There are difficulties with this decision. There is no doubt that the 'marriage' of 1913 was invalid as both parties lacked the capacity to marry. But the subsequent Ordinance marriage in 1933 of the parties, clearly legitimated the daughter. The court did not base its decision on the Moslem Marriage Ordinance or on the Marriage Ordinance and the court did not cite the rule, Moslem or statutory, which forbids a Christian to inherit from a Moslem father. Only the personal law of the father, ie Islamic law in the Gambia, could have prevented the daughter from succeeding to her father's estate.

Anderson, in a Case note⁶¹⁴ also objects to the decision but on different grounds. He agrees

⁶¹³ 1967 J. A. L. p. 137. This researcher first found this case in Anderson case comment

with the court that the daughter should be excluded because she was a Christian. He accepts that the 1913 Moslem 'marriage' was invalid but the Ordinance marriage of 1933 was valid and remained unaffected by any changes in the religion of the couple. Therefore the second marriage was both void and bigamous under the statute law of the Gambia. The second 'wife' should have been excluded from the inheritance.

Anderson's conclusion is controversial. There had been some uncertainty in the past as to whether the nature of marriage (that is monogamous or polygamous) was to be determined at the date of the marriage or at the date of the proceedings. The earlier cases such as *Hyde v Hyde*⁶¹⁵, tended to determine the question at the date of the marriage. It is now accepted that the relevant date of ascertaining the change is at the time of the proceedings⁶¹⁶. At the time of the proceedings, the deceased had been validly married to both wives and none of their children should have been declared illegitimate.

In other African countries, the position is the same. In *Howison's Application*⁶¹⁷, a young Scottish girl of 18 domiciled in Scotland came to Kenya, converted to Islam and married an Asian Moslem according to Moslem law. Her mother sought an order to, *inter alia*, declare the marriage invalid. The court held that the marriage was valid under the law of Kenya even if invalid under Scots law⁶¹⁸. In *Manjang v N'Dongo*, the marriage to the second wife was valid according to the law of the Gambia and Anderson is wrong to believe otherwise⁶¹⁹.

in (1967) J. A. L. p. 137. However, Allott also discusses the case at p. 208.

⁶¹⁴ (1967) J. A. L. p. 137.

⁶¹⁵ (1866) L. R. 1. P & D 130; *Mehta v Mehta* [1945] 2 All ER 690; *Sowa v Sowa* [1961] All ER 687.

⁶¹⁶ *Cheni v Cheni*, [1962] 3 All ER 873, [1965] P. 85.

⁶¹⁷ (1959) E. A. 568.

⁶¹⁸ East Africa Order in Council 1911, Article 2 (2).

⁶¹⁹ *Manjang v N'Dongo* has precipitated a change in the law in the Gambia. After the decision, the Dissolution of Marriages (Special Circumstances) Act 1967, (No. 8 of 1967) was passed and it provides in S.2 (1) that:

"Notwithstanding the provision of any other enactment having the force of law in The Gambia, the Supreme Court shall have jurisdiction to dissolve by decree any marriage at the instance of either party thereto in the following circumstances-

The post-independence decisions on the status of the *Sharia*, as a connecting factor, are not satisfactory either. In the Ghanaian case of *Kwakye v Tuba*⁶²⁰, the court held that succession to a Moslem's property should be by the appropriate 'customary law', unless he had been married under the Mohammedan Ordinance⁶²¹, in which case Islamic law would apply. Most probably the decision was based on public policy grounds to enable the wife, who was married under local customary law, to inherit from the Moslem husband. Any other explanation makes the decision untenable. It is the personal law of the deceased alone which determines which law governs the disposition of his property upon death and not the *lex loci celebrationis*.

(d) Christianity

Christianity has had little impact on law in colonial Africa and did not provide a connecting factor. Except for Sierra Leone, Christianity is not mentioned in any legislation⁶²². Thus, in

(a) the marriage is in monogamous form recognised by the law of The Gambia;

(b) since the celebration of the marriage one of the spouses has in good faith and to the satisfaction of the court become converted to a religion which recognises polygamous marriages and the other spouse has not been so converted."

It must be noted that the law does not render the marriage void but entitles a party to approach the court for dissolution of the marriage.

⁶²⁰ (1961) G. L. R. 720. Also discussed in Allott, p. 210.

⁶²¹ Cap. 129.

⁶²² Cap. 95, 1960 (Revision. of 1967) was passed and it provides in S.2 (1) that:
"Notwithstanding the provision of any other enactment having the force of law in The Gambia, the Supreme Court shall have jurisdiction to dissolve by decree any marriage at the instance of either party thereto in the following circumstances-

(a) the marriage is in monogamous form recognised by the law of The Gambia;

(b) since the celebration of the marriage one of the spouses has in good faith and to the satisfaction of the court become converted to a religion which recognises polygamous marriages and the other spouse has not been so converted."

the Christian Marriage Act of Sierra Leone, Africans married by Christian ceremony must remain monogamous⁶²³. Thus, Christianity was employed to regulate the concept of monogamy only and not to impose a general body of law or to establish a connecting factor.

VIII. Non-Africans Subject to Customary Law?

From the wording of Section 19, it would seem that anyone could be subject to customary law but in *Brown v Miller*⁶²⁴, Crampton Smyly CJ, thought differently. In that case he said,

"...mere residence alone on the Gold Coast, even if prolonged or even if he should purchase Accra land, does not make a stranger coming to the Colony a Native son to bring him within the jurisdiction of the Native Tribunals as established under the Native Jurisdiction Ordinance 1882 as amended"⁶²⁵.

The facts of the case were as follows. M, a spinster, was a West Indian resident in the Gold Coast Colony for 62 years. She acquired land from a local Ga chief and was now being sued in a Ga Native Tribunal regarding title to the land. M claimed that she was not a "Native" under the Native Jurisdiction Ordinance 1883 S.2⁶²⁶ and was therefore not subject to the jurisdiction of the native court.

On appeal, the Full Court of the Gold Coast held that M was not a native but a West Indian. The court was asked if it was at all possible for a non-African to "naturalise" as a native. Wilkinson J, answered for the court;

It must be noted that the law does not render the marriage void but entitles a party to approach the court for dissolution of the marriage.

⁶²² (1961) G. L. R. 720.

⁶²³ *ibid.*

⁶²⁴ (1921) F. Ct. '20 - '21, 48.

⁶²⁵ Reproduced in Allott, p. 197.

⁶²⁶ No. 5 of 1883. The section defines a "Native" as "Any person who is under Native Customary Law or under any Ordinance a member of a Native Community of the Colony, Ashanti or Northern Territories."

“If there were a Native Customary Law according to which strangers to this country (let alone to West Africa) could become for the purposes under reference members of a native community without any exercise of conscious volition on their part, and by mere length of residence or by mere holding of property, or merely by being domiciled here, or merely by marriage, I do not think that would be a law or custom which this court would be bound to enforce under Section 19 Ordinance No 4 of 1876”,⁶²⁷.

The learned judge did not think such a custom existed and if such a clear choice were made by a non-African, then;

“...it must be clearly shown that he has, by definite and unmistakable signs and acts committed himself to the adoption of membership of the native community which claims him as one of its body”,⁶²⁸.

The unmistakable signs were, *inter alia*,

- a) voluntary participation in liability for stool debts (crown debts);
- b) voluntary submission to a stool levy (crown tax);
- c) formal avowal of allegiance to a native stool;
- d) active participation *qua* member in formal stool ceremonies.

However, the judge warned that each case must be dealt with on its own merits and no single factor *per se* would be conclusive. What this seems to mean is that a domicile of choice is nearly impossible to acquire in a West African community. It would seem that the court was applying the English attitude to domicile of choice and was not interpreting Section 19. The Section states clearly that "any person" could take advantage of customary law. However, this was not how the courts saw it.

⁶²⁷ Cited in Allott, 197.

⁶²⁸ (1921) F. Ct. '20 - '21, at p. 51.

In *Savage v Macfoy*⁶²⁹, M, a domiciled Englishman, of the settler freed slave origin residing in Sierra Leone, moved to live in the Yoruba community of Western Nigeria. He went through a ceremony of marriage to a native Yoruba woman, S, by customary law. After M's death, S sued for a declaration that she and her children by M were entitled to succeed to M's estate as against M's brothers and sisters. The question that arose was whether the marriage between M and S was valid. A marriage by Yoruba law would be potentially polygamous and would therefore be valid only if M had acquired a domicile of choice in Yorubaland. If M had not acquired a domicile of choice in Yorubaland, then the marriage would be invalid as a potentially polygamous marriage which would be against public policy in English law.

Section 19 of the Supreme Court Ordinance 1876 provided that "any person" could claim the benefit of customary law and it was argued before the court that "any person" should be taken to mean what it said and consequently a European should be capable of contracting a valid marriage in the colony according to native custom. Osborne, CJ, thought that although M may have acquired a domicile of choice in Yorubaland, that did not necessarily make him subject to the local law. His ordinary relations would be governed by English law. Therefore according to English law, M lacked the capacity to enter into a potentially polygamous marriage. The court however applied the *lex situs*, Yoruba law, which made no distinction between legitimate and illegitimate children, to govern the immovable property and made a declaration in favour of M's children by S.

It is granted that English law does not easily recognise acquisition of a domicile of choice. As Scarman, J, put it in *In the Estate of Fuld*;

"...two things are clear - first, that unless the judicial conscience is satisfied by evidence of change, the domicile of origin persists; and secondly, that the acquisition of a domicile of choice is a serious matter not to be lightly inferred

⁶²⁹ (1909) Ren. 504.

from slight indications or casual words",⁶³⁰.

Nevertheless, the decision in *Savage v Macfoy* is wrong. Once the court accepts that a person has acquired a domicile of choice, all his personal matters must be governed by the law of the domicile of choice. Happily the decision was not followed by other courts⁶³¹. The decision in *In Re Sapara*⁶³², a later decision, suggests that the courts had moved on to more modern times. Although domicile was not discussed, it appears apparent that Dr Sapara had been born in Sierra Leone but had moved to Southern Nigeria where he lived for most of his life. By deciding that he was a "native", the court must have accepted that he had been domiciled in Southern Nigeria.

A question that was never resolved was whether a European woman married to an African man and who therefore had acquired a domicile of dependence in an African community was subject to local customary law. Until the coming into force of the Domicil and Matrimonial Proceedings Act 1973, a married woman automatically acquired as a domicile of dependence, that of her husband. It would follow that an English woman who married an African domiciled in the Gold Coast and subject to customary law, would automatically acquire the husband's domicile. There are no decided cases on the issue although there were such marriages in existence.

Faced with a situation as described above, the court would probably have one of two ways of approaching the problem. First, the court could find that the wife had acquired her husband's domicile of dependence and was therefore a "native", for the purposes of Section 19 of the Ordinance, thus conforming strictly to the English notion of domicile of dependence. Second, it could say that customary law applied to the wife only in cases where "substantial injustice" would be done otherwise, for example in cases of succession to the deceased husband.

The first option is to be preferred but the conduct of English courts at the time could not

⁶³⁰ *In the Estate of Fuld (No.3)*, [1966] 3 All ER 776, at p. 686, [1968] P 675.

⁶³¹ Allott at p. 128.

preclude the second option. However, it is interesting to note that the issue never came before the courts but it is possible that couples of mixed marriages conducted their affairs in such a manner as to avoid the application of customary law in their private matters.

⁶³² (1911) Ren. 605.

CHAPTER SEVEN

CHOICE OF LAW IN POST-INDEPENDENCE AFRICA

GHANA

I. Introduction

On 6 March 1957, Ghana became the first black African country to attain its independence and on 1 July 1960, introduced the Republican Constitution but remained in the Commonwealth. It was then decided to overhaul the entire judicial and legal system. As part of that exercise, a new Courts Act was enacted, Section 66 of which, for the first time, provided a complete set of choice of law rules. The Courts Act has been re-enacted as NLC Decree Paragraph 64, which in turn has been superseded by the Courts Act 1971, but Section 66 of the Courts Act is worth some examination.

II. The Position before 1960

Parts of the wording of Section 19 of the Courts Ordinance 1876 were no longer suitable in a sovereign state and needed amending. The Section provided that where all parties were “natives”, customary law applied, unless the parties had agreed that English law should apply. The distinction between “natives” and “non-natives” was no longer meaningful and it was out of place for English law to apply. Further, Section 19 gave no guidance for determining which of two or more conflicting customary laws should apply.

The old law also provided that in a case between a “native” and “non-native” English law was to apply unless strict adherence to it would cause substantial injustice. In such a case however, applying English law would be unjust to one party, while applying customary law would be unjust to the other. Such was the case in *Koney v Union Trading Co. Ltd*⁶³³. Koney, an educated African carpenter, bought a sawing machine from the defendant company. After using it for nine years, he returned it to the company and sued for breach of

contract, claiming that the machine was unfit for its purpose. The defendant company pleaded the Statute of Limitation. The Divisional Court held that to apply English law would cause substantial injustice to the plaintiff since limitation periods did not exist in customary law.

The decision was reversed by the West African Court of Appeal which pointed out that the party alleging that application of English law would cause substantial injustice should prove it⁶³⁴. In the circumstances that Ghana was now a sovereign state, it was no longer appropriate for foreign law to be accepted by the courts as the applicable law which would apply automatically unless domestic law was pleaded.

The old provision also stated that customary law was applicable only when a party claimed the benefit of it. Thus, the existence of a customary law rule was treated as a question of fact. The failure to claim the benefit of a customary law rule would therefore call for the automatic application of English law.

Section 19 went on to provide that customary law, though applicable, was not to apply if the parties had agreed to the exclusive application of English law. The courts made only one exception in this case. If the application of English law, though agreed by the parties as the applicable law, would deprive a third party of a right acquired under customary law, the court would apply customary law. Such was the case in *Nelson v Nelson*⁶³⁵. In that case, a piece of land was bequeathed under customary law rules to N to hold for himself and for all other children of the deceased. Part of the land was compulsorily acquired by the Government and with the compensation money, N bought another piece of land by a conveyance in English law. N then sold the piece of land by conveyance in English law, to a limited company. The other members of N's family now sued for the sale to be set aside as they were not consulted before the land was sold. In customary law, the proceeds of a sale of family property will be traced to any other property that is purchased with the proceeds. The court set aside the sale and remarked that the onus of determining whether all parties were

⁶³³ (1934) 2 W. A. C. A. 188.

⁶³⁴ *ibid*, at p.194.

consulted lay on the purchaser under the *nemo dat quod non habet* rule. Generally, however, there were difficulties determining when the parties had agreed that English law should exclusively govern the transaction. Some of these difficulties are discussed below.

- (i) *In a case involving a “native” and a “non-native”, does an agreement to apply English law override the “substantial injustice” provision?*

It may be recalled that Section 19 provided that English law was to apply unless substantial injustice would be done to one party. It appears that the agreement to apply English law would prevail over the substantial injustice provision. In *Nelson v Nelson*, Verity, Ag. P, remarked that if the parties

“... agreed or must from the nature of the transaction be taken to have agreed that their obligations are to be regulated by English law, then the question as to what law is applicable has been determined by their conduct⁶³⁶”.

The result would seem to be that where mixed parties are concerned, the court may perpetrate “substantial injustice”. One would have thought that the provision was meant to protect a weaker party to the agreement, a party who did not fully understand the consequences of the agreement to apply English law exclusively. In *Nelson v Nelson* the court did not apply the common law possibly because the agreement to apply English law was not obvious.

- (ii) *Did reference to an express contract exclude implied contracts?*

The question to be determined is whether “express contract” and “the nature of the transaction” are meant to describe two types of contracts, express and implied contracts, or whether “nature of the transaction” merely refers to cases where the parties to the express contract fail to select English law but the nature of the transaction points to that law. The point was raised in *Ferguson v Duncan* where Windsor-Aubrey, J, remarked that;

⁶³⁵ (1951) 13 W. A. C. A. 248.

⁶³⁶ *ibid*, at p. 249.

“Counsel for the appellant particularly stresses the words ‘express’ and ‘exclusive’ though to my mind the weight to be attached to the first-mentioned word should not be over-stressed since it refers only to one particular form of contract and is not applicable to all contracts”,⁶³⁷.

Thus, “nature of the transaction” did not refer to implied contracts but only to express contracts.

(iii) *Must the agreement relate only to obligations to bring into operation English law?*

The Courts Ordinance provided that:

“No party shall be entitled to claim the benefit of any local law or custom if ...such party agreed that his obligations should be regulated by English law”.

It is not clear why English law would apply if the party claiming the benefit of customary law had obligations to perform but would not apply where he was receiving benefits. In a normal contract there would be obligations and benefits, as where goods are to be delivered for payment.

(iv) *What was the significance of the word “exclusively”?*

The courts appeared to have attached great significance to the word “exclusively”. As Windsor-Aubrey, J, put it in *Ferguson v Duncan*;

“The word ‘exclusive’ (*sic*) however, applies to all forms of contract. In other words, as I understand the position, native law and custom are not ousted even when the parties had no clear conception in their minds and contemplated a mixture of

⁶³⁷ (1953) 14 W. A. C. A. 316, at p. 317.

English law and native law and custom”⁶³⁸.

The dispute in the case involved a loan of money evidenced by a receipt bearing a twopenny stamp. The court observed that a receipt of this kind “...is not technical in form and is exceedingly common even among illiterate Africans⁶³⁹,” and therefore declined to infer from it an agreement to be bound exclusively by English law. In a community, such as the Gold Coast was, where there were many nationalities, it may not have been unusual for certain issues in a contract to be governed by customary law while others were governed by English law, such as in land cases. The courts failed to see this plural element in the colony and applied only one legal system to the whole case.

(v) *Could the parties have chosen some other law, such as German law?*

The provision mentions only English law and customary law but could the parties have chosen any other law? In private international law, parties to a contract are at liberty to choose any law to govern the contract and the court will enforce it, subject to public policy considerations⁶⁴⁰. No guidance is given on this point and there appear to be no decided cases on the subject.

What is uncertain is the meaning the court would have attached to “...in cases where no express rule is applicable to any matter in controversy, the court shall be governed by the principles of justice, equity and good conscience”. If the parties to a contract were to have chosen German law to govern the contract, would the court have interpreted the clause liberally and have applied German law? Or would the court have stuck to the provision that where customary law is not invoked then English law applied? Most probably the court would have resorted to the “substantial injustice” clause and applied the common law unless one party were able to prove to the court that he would suffer substantial injustice unless German law were applied.

⁶³⁸ *ibid*, at p. 317.

⁶³⁹ *ibid*, at p. 318.

⁶⁴⁰ Article 3, *The Rome Convention*. See Cheshire & North’s *Private International Law*, 13th Ed. p. 552.

(v) *Inter-customary law conflicts.*

The Courts Ordinance provided no guidance for determining conflicts between the various customary laws. Theoretically, each customary law system ought to contain its own rules for resolving conflicts with other customary law systems. However, it is just possible that on certain issues, the customary law system did not have a solution. The courts did not seem to notice that there were differences between the various customary law systems. As Bennion puts it;

“For many years, however, the courts regarded ‘native law and custom’ as more or less uniform in the Gold Coast and no developed theory of internal conflict of laws is discernible from the earlier cases”,⁶⁴¹.

Bennion observes however, that with the advent of African judges, the courts began to recognise the differences in customary laws⁶⁴². For example, the private international law rule that the *lex situs* applies to the disposition of immovable property cannot easily apply in the Ghanaian situation. In certain parts of the country, succession to property is matrilineal, that is, one inherits from one’s maternal family, while in other parts, inheritance is from the patrilineal family. Thus, if an Ewe (patrilineal) dies intestate and leaves a house in Kumasi a (matrilineal area), the application of the *lex situs* rule would deprive his wife and children of the house, quite contrary to the requirements of the personal law and expectations of the deceased.

⁶⁴¹ Bennion, F. A. R; *The Constitutional Law of Ghana*, 1962, p. 447.
Bennion was one of the drafters of the Republican Constitution.

III. Ghana Choice of Law Rules, 1960

PART VII-COMMON LAW AND CUSTOMARY LAW

66. **Application of common law and customary law** -(1) Subject to the provisions of any enactment other than this sub-paragraph, in deciding whether an issue arising in civil proceedings is to be determined according to the common law or customary law and, if the issue is to be determined according to customary law, in deciding which system of customary law is applicable, the court shall be guided by the following rules, in which reference to the personal law of a person are references to the system of customary law to which he is subject or, if he is not shown to be subject to customary law, are references to the common law:

Rule 1. Where two persons have the same personal law one of them cannot, by dealing in a manner regulated by some other law with property in which the other has a present or expectant interest, alter or affect that interest to an extent which would not in the circumstances be open to him under his personal law.

Rule 2. Subject to Rule 1, where an issue arises out of a transaction the parties to which have agreed, or may from the form or nature of the transaction be taken to have agreed, that such an issue should be determined according to the common law or any system of customary law effect should be given to the agreement.

In this rule "transaction" includes a marriage and an agreement or arrangement to marry.

Rule 3. Subject to Rule 1, where an issue arises out of any unilateral disposition and it appears from the form or nature of the disposition or otherwise that the person effecting the disposition intended that an issue should be determined according to the common law or any system of customary law effect should be given to the intention.

⁶⁴² *ibid*, at p. 447.

Rule 4. Subject to the foregoing rule, where an issue relates to entitlement to land on death of the owner or otherwise relates to title to land-

(a) if all the parties to the proceedings who claim to be entitled to the land or a right relating thereto trace their claims from one person who is subject to customary law, or from one family or other group of persons all subject to the same customary law, the issue should be determined according to that law;

(b) if the said parties trace their claims from different persons, or families or other groups of persons, who are all subject to the same customary law, the issue should be determined according to that law;

(c) in any other case, the issue should be determined according to the law of the place in which the land is situated.

Rule 5. Subject to Rules 1 to 3, where an issue relates to the devolution of the property (other than land) of a person on his death it should be determined according to his personal law.

Rule 6. Subject to the foregoing rules, an issue should be determined according to the common law unless the plaintiff is subject to any system of customary law and claims to have the issue determined according to that system, when it should be so determined.

(2) Notwithstanding anything contained in the foregoing provisions of this paragraph, but subject to the provisions of any other enactment-

(a) the rules of the common law relating to private international law shall apply in any proceedings in which an issue concerning the application of law prevailing in any country outside Ghana is raised;

(b) the rules of estoppel and such other of the rules generally known as the doctrines of equity as have heretofore been treated as applicable in all proceedings in Ghana

shall continue to be so treated.

The major differences between the old and the new rules stand out clearly. First, The new rules are meant to guide the court as to how to determine whether the common law or customary law (and if so which system of customary law) governs an issue in a case. In the Courts Ordinance, the choice was not given to the court but was left to one of the parties, who had to convince the court that unless customary law applied, he would suffer substantial injustice. Second, the court now had to decide which of different systems of customary laws applied. Third, the subsection applies to issues involved in the case, so that rules from several legal systems, customary and common law, may apply in the same case. In a legally plural society as Ghana is, it would not be unusual that a number of issues arise in one case, some to be decided according to the common law, while others fall to be decided by one or more systems of customary law, as in land cases. This method of picking and choosing legal rules from several legal systems to govern different issues is known in private international law as *depeçage* and can be a useful tool in a legally plural society⁶⁴³.

By way of illustration, where a person sells property by way of conveyance in English law, it might be necessary to determine whether the vendor was also the owner by referring to a customary law regime. If it is established under the applicable customary law that he was the owner, then common law would apply to determine the legal effect of the conveyance. In the majority of cases there may be no need to apply this method of choice of law but it is important that the court is aware that rules from different legal systems may apply to different issues in the same case.

Another important distinction is that the court is to be “guided” by the rules. This implies that the rules are laying down principles as opposed to the rigid rules laid down by the Courts Ordinance, such as “express contract” etc. There are bound to be cases which would not fit exactly according to the rules as they stand. For example, Rule 6 mentions the “plaintiff” but there could be joint plaintiffs, each subject to a different regime of customary law. In such a case, the court could easily interpret the rules to fit the case at hand.

⁶⁴³ Elias, T. O; *British Colonial Law*, 1962, p. 222.

One point which is not quite clear is that sub-section 1 ends with a definition of “personal law”, being the customary law to which a person is subject. However, “personal law” is used only in rules 1 and 5, while a person “subject to” a customary law is used in rules 4 and 6. If the use of the two expressions is deliberate, then there must be a reason. Does it mean that “personal law” is referring to the law of domicil, while “subject to” a customary law refers to the law of habitual residence? The law of habitual residence may be displaced easily, so that a non-Ashanti person may be “subject” to Ashanti law as long as he resides in Ashanti territory but once he moves to, say Ewe territory, he discards Ashanti law and becomes subject to Ewe law. A personal law, as defined by the Act, or law of domicil, on the other hand, is far more difficult to discard and requires a more detailed enquiry by the court before the change of domicil would be accepted.

It is also possible that the two expressions are used to cater for unusual possibilities, such as where it is alleged that one person is subject to two different regimes of customary law. For example, where an Ashanti woman (matrilineal society), marries an Ewe man (patrilineal society), the woman’s personal law remains Ashanti law but in relation to certain incidents of the marriage, she may be deemed subject to Ewe law, such as in the case of succession. Possibly, this is an occasion where the person must be “shown” to be subject to a customary law. For example, if the married couple were to purchase joint property with joint resources, the court would have to decide which customary law governs the disposition of the property. If Ashanti law applies, the wife’s share of the property would go to her nieces and nephews of her maternal family. If, however, Ewe law applies, then her share would go to her own children and her spouse jointly. This is probably a situation where it may be “shown” to the court that the wife, in matters of inheritance, is “subject” to Ewe law while her personal law remains Ashanti law.

Rule 1. This rule appears to restate the position in the old rules, although the language is different and removes uncertainty. The old Section 19 stated that:

“Such laws and customs shall be deemed applicable in causes and matters where the

parties thereto are natives of the Colony...in causes and matters relating to marriage and to the tenure and transfer of real and personal property and to inheritance and testamentary dispositions....”

The expression "expectant interest" in Rule 1 seems to refer to family property in customary law which cannot be disposed of in disregard of the customary law governing the disposition.

The Rule also reproduces the position already known to the law and refers mainly to family property. Thus, a member of a family cannot, by a form appropriate to the common law or some other legal regime, convey an interest in family property other than in the law to which the family is subject. If under that law, the consent of the other members of the family is required before the conveyance is made, the property cannot be validly conveyed without such consent. The same applies to a will drafted in the English form. In short, the *nemo dat non quod habet* principle applies.

Rule 2 again preserves the old provision that where parties agree or are deemed to have agreed through the nature of the transaction that the Common Law should apply, effect is to be given to this. Rule 2 however extends the meaning of "transaction" to cover marriage or agreement to marry. This must be meant to cover the cases of "inter-marriage" across the customary legal systems. The nature of the transactions at the contracting stage would determine which law governed the legal issues arising out of the marriage, such as the right of the spouses to each other's property in case of divorce or death; or the determination of the community to which the children belong. Allott thinks Rule 2 does not solve the problem adequately.⁶⁴⁴ Thus, he argues that the child of a Fante father (matrilineal system) and an Ewe mother (patrilineal system), would have difficulty determining which law declared him "legitimate", or determining to which ethnic group he belonged. It is not clear why Allott thinks Rule 2 is incapable of solving this problem. The negotiations which take place between the spouses' families before the marriage are recognised by Rule 2 as "transactions" and therefore if by those transactions it can be shown that children of a legally

⁶⁴⁴ Allott, p. 137.

"mixed" marriage are to belong either to the father's community or to that of the mother, the court must give effect to that. As to Allott's worry about legitimacy, it is baffling how a child born in wedlock, under any legal system, could ever be described as "illegitimate".

French colonial administration attempted to solve the same difficulty and it was decided that;

"On doit appliquer, en matière de mariage et de divorce, *la coutume qui a présidé à la négociation du contrat de mariage*⁶⁴⁵ ou, s'il n'y a pas eu de contrat, la coutume de la femme."⁶⁴⁶

Thus, the law which governs the negotiations or transactions, is seen as vital in determining the legal issues which arise in a marriage, including the status of children, where applicable. Thus, if an agreement to marry has been reached and a child is born but the marriage never takes place, due to, say, death of one of the parties, the child would be subject to the law governing the transaction.

The Rule also improves upon the position in the Courts Ordinance which referred to "express contract". Now there is only a reference to the agreement of the parties regardless of whether there is an express or implied contract.

The Rule provides that "transaction" includes a marriage or an agreement to marry. Thus, any person in Ghana, including Europeans may now enter into a marriage irrespective of his or her personal law or law of domicil.

Rule 3 clarifies the situation where a unilateral disposition is concerned. The old rules did not provide specifically for this but merely stated that customary law was to apply in matters relating "...to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions...." The new rule permits the testator to choose between the

⁶⁴⁵ Emphasis mine.

⁶⁴⁶ Rolland et Lampué, ; *Précis de droit de pays d'outre-mer*. 4th Edition, 1949, p. 305.

Common Law and other customary legal systems.

Rule 4 is merely a restatement of the position which existed in the old law, except for the introduction of *lex situs*. The customary law (or the personal law) of the deceased governs the disposition of the land, otherwise the law of the place where the land is situated governs the disposition.

Subject to the effects of Rules 1, 2 and 3, if all parties to the proceedings trace their claim to the land from a person or persons who are all subject to the same customary law, effect should be given to that law. In any other case, it should be decided according to the *lex situs*. Does this mean that in a case where property is jointly owned by a "mixed" couple (matrilineal/patrilineal), the *lex situs* will always prevail? This would produce undesirable results as the expectations of the couple are likely to be different. An Ewe husband and an Ashanti wife having joint property in Ashanti territory must be presumed to have agreed that only one customary law, Ewe or Ashanti, governs certain incidents of their marriage. If Ewe law applies, the wife's share of the property would go to the children of the marriage and the surviving spouse but if Ashanti law (*lex situs*) applies, the property would go to the maternal nieces and nephews of the wife, to the exclusion of her own children and the surviving spouse. This solution produces drastic results and a court is likely to decide that the wife had agreed to be subject to Ewe law in relation to certain incidents of the marriage and inheritance would be one of them.

Rule 5 entrenches the Private International Law rule that the "personal law" of the deceased governs the disposition of his movable property. However, this rule is subject to Rules 1 to 3, which may restrict the scope of the law governing the disposition. Thus, the customary law rights of the surviving spouse under Rule 2 may restrict the scope of the personal law of the deceased.

Again there could be difficulties regarding a "mixed" marriage such as described in the context of Rule 4 above. An Ashanti woman married to an Ewe man continues to retain Ashanti law as her personal law. However, can the court decide that as regards certain

incidents of the marriage, she is subject to Ewe law? Most probably the court would accept that for the purposes of inheritance, she was subject to Ewe law, as to her movables acquired during the marriage. In fairness however, there should be a distinction between the immoveable property she acquired before the marriage, which should be governed by her personal law, Ashanti law, and that acquired during the marriage, which should be governed by Ewe law.

It is also possible that the deceased may have left his movables in a will governed by a law other than his personal law (Rule 3).

Rule 6 lays down a mandatory application of the Common Law unless the plaintiff claims to be subject to a customary law system and wants the issue determined by that law. The plaintiff is thus given the right to elect the law which governs the issue. Rule 6 appears to be most appropriate for tort cases but there is no reason why it cannot apply to contract cases as well.

The effect of rule 6 is that the common law will apply in a case not governed by rules 1 – 5, unless the plaintiff is subject to a regime of customary law and claims to have the issue determined according to it. If, on the other hand, a person suffers a wrong for which he believes his customary law provides adequate remedy, he may pursue the case under his customary law, even against a defendant who is not subject to that customary law. This is in keeping with the new approach to customary law, as an integral part of the laws of Ghana. Therefore the content and existence of customary law is a matter of law and not of fact⁶⁴⁷.

Although the rule applies mainly to tort cases, it can also apply to contract cases, where, for example, no agreement can be inferred from the conduct of the parties to indicate an intention to be bound by a particular legal system. In a case of a simple debt, for example, where there is no indication as to the parties' intention as to the applicable law, the common law will apply, unless the plaintiff claims he is subject to a customary law system and wants

⁶⁴⁷ Courts Act (C.A.9) S.67 (1).

the matter judged by that law⁶⁴⁸.

It would seem that where the plaintiff is not a member of a Ghanaian community but of a community of another part of Africa, he cannot claim to have the matter settled under that foreign customary law, unless he can show an agreement between the parties that this foreign customary law is to apply. In any case the recognised rules of private international law would apply in such a case, which might end up applying his foreign customary law.

Paragraph (b) of rule 6 is intended to keep in use, rules of equity, such as *res judicata* in order to modify the harshness of some customary law rules.

Although section 66 refers to the "personal law" of the person, it seems clear that the expression is not meant to convey the same meaning as in private international law. As shown in the introduction to this thesis, West African legal systems are not personal but community-based. Thus, membership of the community confers a connecting factor on the individual. "Personal law" is used in this legislation to reflect the fact that the individual carries his law of domicile with him within the country.

Nevertheless, it is unclear why the concept 'personal law' is used while a connecting factor, 'community', appears to have been selected to form the basis of legal relations. The term 'personal law' first appeared in legal literature after the destruction of the Roman Empire by the barbarians, mostly Germans. The main reason for the introduction of the term was due to the fact that the barbarian conquerors themselves, not constituting one nation, came from several legal systems and could only profess the law of their 'natio' or their birth-law⁶⁴⁹. If 'community', as used, refers to territory, then clearly territorial law is being created and the term 'personal law' ceases to have a meaning. In that case, the only persons in Ghana to whom the term could apply are those to whom the common law applies.

The major criticism of the provision is that 'customary law' is defined as 'rules of law' which

⁶⁴⁸ Rule 6 (2) (a).

⁶⁴⁹ Savigny; *Private International Law: A Treatise on the Conflict of Laws*. William

by custom are applicable to particular communities in Ghana'. Thus, the definition excludes those who cannot show that they form a community, especially isolated foreigners. It is however possible that the common law notion of domicile would be applied to determine that these persons are still domiciled abroad but that can sometimes bring hardship.

It appears that the drafters seem to have decided first that everyone ought to have a personal law, then set about looking for a connecting factor to supply the basis for it. The reverse should have been the case. The concept 'community' should have been clearly defined as a connecting factor and then allowed to regulate relations of individuals of that community. In most African societies the ancestral home is the connecting factor which also provides the applicable law in personal matters. As far as being subject to a local legal system is concerned, "there has never been a decision in the Ghanaian courts to the effect that a person had lost his or her personal law"⁶⁵⁰. Residence alone has never been sufficient to determine 'personal law'. It is however arguable that in the modern industrial age, people are likely to 'disappear' into an urban community and abandon their ancestral homes. In that case, the concept of "habitual residence" should have been included to cater for such cases.

The purpose of inter-local conflict rules must be to determine which law applies to which person; to regulate matters of status, unilateral dispositions (eg a will); and to indicate which law is to apply and which remedies will be available in matters regarding tort and contracts.

The Courts Act 1960 was a commendable attempt to achieve this purpose. It is unfortunate that judicial activism has not been able to keep up with the legislative aspirations of the drafters.

Guthrie's translation, 1869. SECT.III, pp. 15 -16.

⁶⁵⁰ Dateh Bah, (1973) 5 *G. L. R.* p. 138.

CHAPTER EIGHT

SPECIFIC TOPICS

CONTRACT

1. Introduction

Generally, African local legal systems are familiar with various areas of the law of contract, such as sales, pledges of land, sale and bailment of goods, labour contracts etc. However, there could be problems when the court has to find the proper law of the contract where the parties are not agreed as to what law governs the contract. Let us take the following example to illustrate the problem. Y, a dressmaker of limited education, orally agreed to make a wedding dress for X, a university lecturer for the sum of £35. X paid a deposit of £10. Y finished the dress one week before the wedding but before X could collect it, Z a petty trader offered Y £40 for the dress and Y quickly disposed of it. When X came to collect the dress, Y apologised for having failed to make the dress and refunded the deposit of £10. By coincidence, X went to the market and bought the same dress for £45. What law is applicable, the local legal system to which both Y and X are subject or the common law as received? Under the Ghana rules of 1960, the local law applies if both parties are subject to it and therefore Y is probably not liable for X's extra expense in obtaining the dress but perhaps she might be liable for the profit she had made on the sale to Z⁶⁵¹. At common law, Y would be liable to compensate X for the extra expense incurred in obtaining the dress. Suppose X had paid no deposit at all, she would probably have no remedy at local law but at common law Y would have been liable for breach of contract.

Although contract law in African customary law follows the basic rules which are known to European legal systems, there are some major differences. For example, the concept of executory contract, that is the mere exchange of promises, is not known to many customary

⁶⁵¹ This is a real case which was withdrawn before it could come to court. See Agbede, I. O; *Legal Pluralism*, 1991, p. 103.

law systems. In a case brought before the Meru African Court⁶⁵² in Kenya, Y agreed to buy land at an agreed price from X. The final agreement was in the written form and was tendered in evidence. After the agreement was reached, X changed his mind and wanted his land back. The court found for X on the ground, that although Y had occupied the land, he had made no payment to X, and the mere agreement was held not valid.

On the other hand, what Ghai calls "executed consideration"⁶⁵³ is recognised to create contractual liability, although there is no agreement. In a case brought before the same Meru African Court, B had paid a fine on behalf of his brother C to the Resident Magistrates' Court, as well as compensation awarded against C. C was in prison at the time and had not requested the payment to be made nor was there an understanding that C would repay B. B sued for recovery of the sums paid on behalf of C and the court refused to accept C's plea that there was no agreement of any sort for him to repay the money to B. The court held that B had made payments on behalf of C and C had the obligation to repay the debt.

The closest analogy to this concept in the common law would be unjust enrichment which, in the common law, is not contractual. The rationale of the judgment seems to be a desire to do justice rather than to enforce a strict rule of law.

A. Ghana

Under the old law, Ghana contract law was generally the Common Law as received from England. Nevertheless, Section 87(1) of the Courts Ordinance made considerable amendments to the Common Law position. The Section provided that where all parties to the contract were "natives", customary law was to apply unless the parties had agreed that English law should apply. So that if the wedding dress case cited above had taken place in the Gold Coast during the colonial period, customary law would have applied. The position would be the same under the present Ghanaian law. However, under the old law, there was no guidance to the court as to how to determine which of two or more conflicting customary

⁶⁵² No.V of 1964.

⁶⁵³ Ghai, Y. P; "Customary Contracts and Transactions in Kenya", in *Ideas and*

laws applied. However, it is not necessary for choice of law rules to state which law should take precedence over the other as the court applies its municipal law with its own choice of rules which allow for the application of "foreign" law in the appropriate cases. A Ghanaian court faced with a conflict between two local legal systems needs only to look at the law of the forum, which might in turn instruct it to apply, for example, *lex situs* or the personal law of the party concerned.

Section 87(1), in paragraph 2, mentioned examples of cases which may be governed by customary law, ie transfer of real and personal property, inheritance and testamentary dispositions. While these may be the more frequent areas where customary law may apply, there is no reason why they should have been singled out. Paragraph 2 went on to provide that where one party was a "native" and the other was a "non-native", English law applied unless "strict adherence" to it would cause substantial injustice.

The law as it stood, posed difficulties in application. Suppose, for example, that a person subject to the local legal system acquired a right by a procedure based on English law but using the proceeds from property in which others have an interest. According the law as it stood, the rights acquired by him will be determined by local law, as was the case in *Nelson v Nelson*⁶⁵⁴. In that case, in a death-bed disposition, self-acquired land was left to N for himself and all the other children of the deceased who constituted his family. Part of the land was later acquired compulsorily by the government and with the proceeds from the compensation money, N acquired land in his own name by a conveyance in the English form and later, conveyed the same land to a limited company.

Although the conveyance to N in the English form conveyed good title in English law, the transaction was held to be governed by local law according to which N required the consent of all the family before conveying the land and as this was not obtained, the conveyance was void. It made no difference that the conveyance was in the English form, for one could not transfer a title one did not have, *nemo dat quod non habet*.

Procedures in African Customary Law, Ed. Gluckman; 1969, p. 334.
⁶⁵⁴ (1951) 13 W. A. C. A. 248.

Another difficulty with the old provision was that if one of the parties was a "native" and the other was not, English law applied unless "substantial injustice" would be caused if English law was to apply. The onus lay on the party claiming that substantial injustice would be caused if English law applied to establish his case. Thus, in *Koney v United Trading Co. Ltd*, mentioned earlier⁶⁵⁵, the plaintiff was a "native" whose customary law did not know the Statute of Limitations, a common law defence which the defendant raised. It should have been the duty of the court to ascertain the proper law of the contract if no law was specifically chosen by the parties and not to automatically apply English law where one party was not a "native".

As regards the expression "express agreement", the courts interpreted the old law to mean that where the plaintiff contracts with several defendants, only the defendant appearing before the court was entitled to raise the issue that an express agreement was made between him and the plaintiff. Thus, in *Amankwa v Anyan*⁶⁵⁶, it was held that the plaintiff was not precluded from claiming the benefit of customary law by the fact that he had agreed with other parties for the matter to be governed by English law, since those others were not before the court and there was no privity of contract between the plaintiff and those others. What is puzzling about the decision is that the defendant himself claimed that those others were his agents. Therefore there ought to have been privity of contract.

It would seem that the courts were reluctant to reject a claim by the "native" party that "substantial injustice" would be done to him if English law were applied. In *Nelson v Nelson*⁶⁵⁷, the court held that even if N's family had agreed expressly that the transaction be governed by English law, the agreement would still be set aside as N's family were not parties to the transaction and therefore, customary law could not be displaced. The principle seems to be that a person who was not a party to the transaction but later agreed to the application of English law could not be taken to have agreed to the application of that law. So that the "nature of the transaction", which the Section laid down as determining which

⁶⁵⁵ See Chapter Seven (II).

⁶⁵⁶ (1936) 3 W. A. C. A. 22.

law applied, became irrelevant in this case.

A further obstacle in ousting local law was the requirement that the agreement must provide that the transaction be governed "exclusively" by English law. This point arose in *Ferguson v Duncan*⁶⁵⁷ and the court refused to infer from a receipt for a loan, secured by a mortgage in the English form, that the contract was governed exclusively by English law. This extreme position was not followed and was rejected in *Cobbina Ackon v Solomon*⁶⁵⁸.

The *Cobbina Ackon* case was an appeal to the Divisional Court from the District Court, Cape Coast. The plaintiff had claimed the sum of £68. 9s. 2d. as due under two I.O.U.s given him by the defendant in Hamburg, Germany, when the two were on a visit to Europe in 1925. The I.O.U.s were in the following form;

"I owe Mr. J. B. Cobbina Ackon the sum of Fifty-five pounds one and two pence (£55. 1s.2d.) being amount received from him

(Sigd.) J. S. Solomon

Hamburg -27/2/25."

Both parties were "natives" and the magistrate had rejected the defendant's plea that the I.O.U.s demonstrated an intention that English law was to apply exclusively and therefore that the claim was barred under the Statute of Limitations.

Upon appeal, Adumua-Bossman, J. reasoned that although *Ferguson v. Duncan* placed the onus on the defendant to satisfy the court in a dispute between "natives" that customary law had been displaced by English law, the decision was based on a misunderstanding of *Koney v U.T.C*⁶⁵⁹. In his view, the learned Judge thought that no such onus existed, except perhaps where evidence had already been brought to show that the transaction was one recognised by customary law and that some customary requirement, for example, the presence of

⁶⁵⁷ (1951) 13 W. A. C. A. 248.

⁶⁵⁸ (1953) 14 W. A. C. A. 316.

⁶⁵⁹ Civil Appeal No. 6/1959. Unreported.

⁶⁶⁰ (1934) 2 W. A. C. A. 188.

witnesses, had been observed. The learned Judge doubted the likelihood of parties to a simple transaction such as an ordinary loan of money contemplated a mixture of English and customary law. He went on to suggest that;

“...it is submitted that even if the parties have not a clear conception in their minds, their language and/or utterances and actions will operate to make the contract fall on one side or the other of the line, i.e. indicate that from a legal point of view the contract between the parties is a customary or else an English one⁶⁶¹.”

(i) Inter-local Conflict of laws

Section 87(1) did not address the possibility that local legal rules could conflict with each other. Possibly this was because each legal system should contain rules for settling conflicts with other legal systems. Nevertheless, the courts continued to regard "native law" as uniform in all of the Gold Coast and no developed theory of inter-local conflicts was discernible. In time though, with the advent of African judges, differences in local legal systems were recognised but still the courts failed to lay down rules. In *Ghamson v Wobill*⁶⁶², Essie Osuomba, subject to Fanti law, was entitled to a house in Winneba, where Efutu law applied. Essie Osuomba died. Under Efutu law (*lex situs*), the house would pass to her daughter Essie Kuma also subject to Fanti law but under Fanti law, it would pass to Kwesi Kra, the head of the family for the use of all the family. Upon Essie Kuma's death, her children took possession of the house which was later sold to Wobill. Kwesi Kra applied to the court to have the deed set aside. The trial judge applied Efutu law as the *lex situs*. The West African Court of Justice resorted to Section 15 of the Native Courts (Colony) Ordinance (Cap.98), which provided that each "native" court was to apply the provisions of any law binding between the parties, and applied Fanti law because the issue was succession which called for the application of the law to which the parties were subject. In land cases, the *lex situs* usually applied⁶⁶³ but in the Ghanaian situation where some local legal systems practice matrilineal inheritance while others practice the patrilineal system, it is not surprising that the *lex situs* may be set aside sometimes. Apart from the few land cases

⁶⁶¹ *ibid.*

⁶⁶² (1947) 12 W. A. C. A. 181.

however, there are practically no decided cases on inter-local conflict of laws in contract. It is therefore to land law that we have to turn for further guidance.

(ii) Land Contracts: Validity of Land Contracts

"...all land in Ghana is regulated by customary law and any alienation thereof must be in accordance with customary law"⁶⁶⁴.

For a contract for the sale of land to be valid a special local custom has to be performed signifying the change of ownership. The Akans refer to it as "cutting of *quaha*" or *tramma* in Ashanti⁶⁶⁵. The ceremony signifies the cutting off of the title of the vendor from the land and vesting it in the purchaser. First, the land is demarcated by the planting of boundary trees, particularly at the corners. These are special trees which have certain peculiarities. They do not grow too big, are durable and survive drastic climatic changes. The Akans usually prefer the *ntome* tree while the Ewes tend to use *Anyra*.

After the demarcation, a portion of the purchase money, or all of it, is paid on the spot and a sheep is slaughtered. For the contract to be valid, there must follow cutting of *quaha*, the performance of which differs from place to place. The usual pattern however is as follows. A member of the vendor's family plucks a leaf, a twig or a blade of grass from the land and hands it over to a member of the purchaser's family. Alternatively, a member of the vendor's family holds one end of a leaf or twig while a member of the purchaser's family holds the other end and the two break the leaf or twig. The vendor then says a prayer invoking his ancestors to bear witness to the transaction and from that moment onwards he divests himself of the land and it becomes vested in the purchaser, his family and successors. In olden times the breaking of the twig or leaf was done by young members of the two families so that living memory could be provided for as long as possible⁶⁶⁶. The rationale was that

⁶⁶³ See for example, *Ekem v Nerba* (1947) 12 W. A. C. A. 258.

⁶⁶⁴ Ollenu, N. A; *Principles of Customary Land Law in Ghana*, 1962, p. 108. Hereafter cited as Ollenu.

⁶⁶⁵ Ollenu at p. 115.

⁶⁶⁶ *ibid*, at p. 117.

the young would survive the old and would serve as eye-witnesses who would pass on the facts of the contract to future generations. In the absence of writing, this was the best that the parties could achieve. In modern times however, documents of transfer are prepared to serve as evidence of the transaction⁶⁶⁷.

As Ollenu points out however, documents merely serve as evidence of the contract and do not alter the nature of the transaction⁶⁶⁸. The position is illustrated in the case of *Cofie v Otoo*⁶⁶⁹. In that case, a vendor made a valid sale of land to the purchaser by customary law and later executed a deed of conveyance in the purchaser's name. Subsequent to the sale by customary law but before the execution by deed, the vendor purported by deed of conveyance to convey the same land to the plaintiff, who applied to the court for a declaration of title and possession. It was held that the defendant's title dated from the day of the transfer by customary law and that the deed of conveyance was merely documentary evidence of a valid contract.

In Ghana, a person cannot opt out of customary law in contracts concerning land. Therefore a conveyance of land or an estate in it which is unknown to the local legal system concerned is invalid. To take Ollenu's example, if an *abusa* (licensee) tenant purports to transfer determinate title in the land, the purchaser gets nothing more than the interest which the *abusa* tenant had in the first place⁶⁷⁰. Thus, the *nemo dat quod non habet* rule applies. Equally, a deed of conveyance purporting to convey a fee simple absolute, free of all encumbrances, must fail as such an estate is unknown in any Ghanaian local legal system. The estate closest to the fee simple in the English sense is the determinable estate.

Where the *guaha* ceremony or demarcation has not been performed, sale is not complete and title to the land does not pass. In *Nkansa v Atia & anor*⁶⁷¹, the plaintiff paid the whole amount on a plot of land said to be situated at Akropong but payment was done at Manfe,

⁶⁶⁷ Ollenu, p. 117.

⁶⁶⁸ *ibid*, at p. 117.

⁶⁶⁹ (1959) G. L. R. 300.

⁶⁷⁰ *ibid*, at p. 119.

⁶⁷¹ (1958) 1 W. A. L. R. 94.

about three miles from where the land was situated. The *guaha* ceremony was also performed at Manfe but the land was never demarcated. When the plaintiff attempted going into possession, he came into conflict, first with the licensees in possession and with the adjoining land owners over the inaccuracy of his boundary markings. The court held that the sale did not conform to the local law and that the contract was therefore void.

(iii) Capacity to enter into Contract

In Ghana law, property, especially land, may be self-acquired, family property, ancestral land or stool property. The concept of *caveat emptor* applies in Ghana local legal systems and the purchaser has to make careful enquiry as to what type of property he is purchasing in order to determine who has the capacity to enter into a contract with him. If the property is self-acquired, the individual owner may freely dispose of it without seeking the consent of anyone. However, to be valid, the contract has to be made in the presence of witnesses, one of whom is usually from the vendor's family.

If the property is not self-acquired, then the procedure is different. Where the property is either family or stool property, then no single individual can make a valid transfer. The consent of the family or of the Chief, acting with consent of the elders, must be sought. The indispensable persons in the transaction are the occupant of the stool or the head of the family, in the case of family property. On their own, however, neither the head of the family nor the occupant of the stool have capacity without consent of the family or of the elders. Any contract entered with them without appropriate consent is void *ab initio*⁶⁷². If the contract is concluded by the head of the family or occupant of the stool purporting to be doing so with consent and concurrence of the family or of the elders, and in the presence of a member of the family or of an elder, the contract is voidable, not null and void. If however the family or elders disapprove of the sale, they must act quickly in order to restore the purchaser to the position he was in before the sale⁶⁷³.

⁶⁷² *Agbloee v Sappor*, (1947) 12 W. A. C. A. 187.

⁶⁷³ *Quarm v Yankah*, (1930) 1 W. A. C. A. 80.

B. Sénégal

(i) Developments in Sénégal

In a referendum organised by the French Government, Sénégal voted on 24 January 1959 to accept De Gaulle's 1958 Constitution and thereupon became an Autonomous Republic within the *Communauté française* (the French Community). It adopted its first constitution and established a parliamentary system⁶⁷⁴. Sénégal and French Soudan (modern Mali), then decided to form the Mali Federation and adopted the Federal Constitution of 17 January 1959⁶⁷⁵. The federal constitution granted extensive powers to the Federal Government and the Assembly and limited the powers of the individual States to administrative competence⁶⁷⁶. Federal matters included civil, commercial and criminal legislation, education, the judiciary and public security.

On 20 June 1960, the Mali Federation gained independence from France but two months later, the federation broke up. Sénégal formally legislated to withdraw from the federation⁶⁷⁷, proclaimed its independence and abrogated all laws and decrees which had granted the federation power to legislate and to regulate matters affecting Sénégal⁶⁷⁸. By the law of 26 August 1960, Sénégal revived its Constitution of 1959, taking into account its independence from both France and Mali⁶⁷⁹.

(ii) Sénégalaise Law of Contract

⁶⁷⁴ Law No. 59-003 of 24 January 1959. *Journal Officiel de la République du Sénégal* 30 January 1959, at p. 62.

⁶⁷⁵ *Journal Officiel de la Fédération du Mali*, 25 April 1959.

⁶⁷⁶ Luchaire, *Droit d'Outre-mer*, p. 184.

⁶⁷⁷ Law No. 60-041 of 20 August 1960. *Journal Officiel de la République du Sénégal*, 24 August 1960, p. 856.

⁶⁷⁸ Cohen, R; "Matters Arising from the Dissolution of the Mali Federation", 36 *BYIL*, p. 375.

In spite of political independence, the legal system continued to be the French colonial legislation, in spite of the obvious defects which this system had. Some of its legal principles were outdated and /or unsuited for African societies. Further, the dualism of French Law and *Droit coutumier* created a dual court system, which did not provide the most efficient means of administering justice.

Despite the defects of the colonial legal system, it continued to operate until 1972, when Sénégal enacted the Code de Famille⁶⁸⁰ which regulated conflict of laws situations. The new law made a radical break with the past by abolishing the *statut personnel* as the connecting factor and replacing it with nationality. What the Sénégalaise authorities appear to have done is to adopt the French national solutions to conflict of laws and its application in the colonies as the source of their new law, instead of looking at it as a simple model of reference, capable of being adapted to suit local situations. The principles are purely those of France. Thus, there is hardly any departure from the system which had been inherited from the colonial master.

As far as choice of law is concerned, the new law of nationality provides no guidance to the court. Article 830 expressly abolishes the difference in conflicts cases between the national legal system and the local legal systems, as well as between the local legal systems themselves. It is probably even more important now for the courts of Sénégal to rely on the rules of private international law to solve inter-local conflict of laws problems. All aspects of family law are governed by the law of nationality but there is no guidance whether a court may characterise the law of nationality and come to the conclusion that, for the purposes of, say, succession, Islamic law applies to the issue. Contrasting this philosophical position with Ghana, one notices a major difference. Whereas the Courts Decree 1960, based the connecting factor on the community from which the individual came, Sénégal bases it on nationality. Most probably, the advantage Sénégal has is that on the international plain, private international law rules would apply without reference to local legal systems. The advantage of the Ghana code is that each issue may be governed by another legal regime.

⁶⁷⁹ Law No. 60-045 of 26 August 1960. Journal Officiel, 31 August 1960, p. 881.

⁶⁸⁰ Law No. 72 - 061 of 12 June 1972. Journal Officiel 12 August 1972, p. 725.

Thus, a Ghanaian who changes his nationality to that of, say British, may still be domiciled in the community in Ghana which provides his connecting factor in personal matters. In certain cases, such as testamentary dispositions, this can be a real advantage.

Having disposed of inter-local conflict of laws, the legislation goes on to provide the usual rules which are known to private international law. Thus, Article 843 provides that capacity to marry is determined by the law of each party; that the law governing the form of marriage is the law of the place where the marriage takes place and so forth. What is not clear from Article 843 is whether foreigners residing in Sénégal may perform their marriages in a form other than that prescribed by the new law. Since Article 144 of the new law has withdrawn recognition from customary marriages, it would seem logical that foreigners residing in Sénégal cannot go through a marriage other than before the civil authorities⁶⁸¹. The Sénégalaise law seems to rely on the maxim *locus regit actum*. While the Sénégalaise law has relied heavily on the French legal system, it has failed to notice that matters such as gifts, testamentary dispositions, succession and marriage are excluded from the French requirement of law of nationality⁶⁸².

⁶⁸¹ It would seem that some legal systems recognise marriages entered into under laws other than those of the State but may require registration of the marriages. Thus, in England and Wales, the registration of Jewish marriages is governed by the Marriage Registration Act 1836, which requires that the President of Board of Deputies of British Jews appoint a secretary for synagogues to handle registration of marriages. The Board is the depository of registrations of marriages.

⁶⁸² Code Civil, Article 841 (French Code).

IV. PUBLIC POLICY

In English law;

"English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law"⁶⁸³.

Most legal systems reserve for themselves the residual power and discretion, to be exercised when needed, to prevent the application of a foreign law or rule on the basis of its notions of justice and social order. These notions are collectively referred to as "public policy" or "*ordre public*" in French law. The function of public policy is to protect the way of life in the *forum* in which it operates⁶⁸⁴ to enhance and preserve the notion of justice of the *forum*⁶⁸⁵ and to prevent the application of foreign law which might jeopardise good relations with friendly foreign states⁶⁸⁶. Although the doctrine is a useful tool in international conflict of laws, it is not frequently used in inter-local conflict of laws. However, with the arrival of European legal systems in Africa, an alien body of law was introduced, which in many cases, was incompatible with the basic African concepts of justice and equity. To resolve this problem; the colonial powers turned the public policy doctrine on its head and excluded the application of indigenous law where it conflicted with British or French notions of justice or equity. Thus, in the colonial situation, the doctrine was constructed to exclude what must be called the *lex fori*.

A. Repugnancy Clauses

In British African colonial legislation public policy, as an expression, was never used but instead, a local law was to be excluded if it failed the repugnancy test. The repugnancy test

⁶⁸³ Rule 2, *Dicey and Morris on the Conflict of Laws*, 13th. Edition, 2000.

⁶⁸⁴ Edoardo Vitta; *International Encyclopedia of Comparative Law*. Vol.111 Ch. 9, p. 17.

⁶⁸⁵ Graveson; *The Scales of Justice in Law, Justice and Equity*, 1967, p. 1.

⁶⁸⁶ *Regazzoni v Sethia*, [1958] AC 301.

was formulated in various ways, such as customary law was applicable so far as it was "not repugnant to natural justice and morality"⁶⁸⁷; "not repugnant to natural justice, equity and good conscience"⁶⁸⁸; or "conforms with natural justice and equity"⁶⁸⁹.

(i) Origin of the Rule

The expression "justice, equity and good conscience" most probably developed within the Canon Law⁶⁹⁰. In England, the expression was employed as a standard external of positive law. Thus, an appeal to "equity, justice and good conscience" was more of an appeal to the ideal law to which positive law was expected to approximate, rather than to positive law itself.

It was, however, during the colonial administration in India that the expression became a residual rule on which to draw when the rules of native law were inadequate or unsuitable in the particular case. English judges in India however, tended to use the rule indiscriminately to apply English law and concepts whenever it pleased them⁶⁹¹. Derrett argues that it was in order to avoid the repetition of the Indian experience in Africa that the word "natural" was added to the word "justice", as is found in most African legislation on the subject⁶⁹².

(ii) Meaning of the Expression

When the expression "natural justice, equity and good conscience" entered African jurisprudence, it was not clear whether the words should be interpreted jointly as one concept or separately as though they were independent of each other. In *Lewis v Bankole*⁶⁹³, Speed Ag. C.J, thought the words had their independent existence but the decision was

⁶⁸⁷ Kenya, Local Courts Ordinance 1962, S. 12.

⁶⁸⁸ Gold Coast (Ghana), S.19.

⁶⁸⁹ Sierra Leone, Local Courts Act 1963, S. 2.

⁶⁹⁰ Derrett, J. D. M; "Justice, Equity and Good Conscience", *Changing Law in Developing Countries*, 1961 Edited: J.N.D. Anderson, p. 114. Cited hereafter as Derrett.

⁶⁹¹ Agbede, I. O; *Legal Pluralism*. Shaneson, 1991, p. 34. Cited hereafter as Agbede.

⁶⁹² Derrett at pp. 148 – 9.

overruled on appeal to the Full Court. As Daniels put it:

“When we look for the meaning of equity in the broad sense, we are told that it is equivalent to natural justice. When we try to ascertain the meaning of natural justice we are told that it is practically equivalent to equity in the popular sense. Then both are said to mean natural justice. At this juncture we re-enter the realm of uncertainties, but one thing is being made clear: it is that the theory of assigning specific meaning to each of the phrases in the content... is untenable....Even though equity is not synonymous with good conscience...yet it can be said that the meaning of equity in the broad sense embraces almost all, if not all, the concept of good conscience. Therefore in the phrase ‘equity and good conscience’ the words ‘good conscience’ can be regarded as superfluous”⁶⁹⁴.

This view is now shared by the judiciary and academics alike:

“...we must read the repugnancy provisions as if it were repugnant to natural justice and treat the following words, ‘equity and good conscience’ as superfluous”⁶⁹⁵.

Nevertheless, it is important to ask whether the repugnancy rule has a precise meaning. According to Derrett, “natural justice, equity and good conscience” is a comfortable formula meaning as much or as little as the judges for the time being care to make it mean⁶⁹⁶. An examination of the case law indicates that Derrett is correct to take a cynical attitude to the meaning of the expression, for, the use of the expression has often produced contradictory results. In the Indian case of *Jaganneth Gin v Sher*⁶⁹⁷, the court upheld the claim that an illegitimate child had the right to inherit from his father on the ground that natural justice favours claims by natural relations as opposed to the claim of the State by escheat. On the other hand the expression has been relied upon by the West African Court of Appeal to hold

⁶⁹³ (1908) 1 N. L. R. 81.

⁶⁹⁴ Daniels; *Common Law in West Africa*, pp. 270 – 271. Cited in Agbede, p. 35.

⁶⁹⁵ Derrett, p. 271.

⁶⁹⁶ *ibid*, at p. 115.

⁶⁹⁷ Cited in Agbede, I. O; *Legal Pluralism*, 1991, p. 36.

that to uphold such a claim would undermine legitimacy⁶⁹⁸.

It is not surprising that the expression does not have a fixed meaning. The public policy doctrine, by its very nature, cannot have fixed rules on behaviour patterns. Each case must stand on its own merit and public opinion on the issue must be taken into account. The repugnancy rule is applied to regulate the consequences customary law produces and not the customary law rule itself. Therefore, while a customary law rule may produce favourable consequences at one time, the same rule may produce quite a negative consequence at another time. It is submitted that a rule by itself, is rarely repugnant. The role of public policy is to protect certain interests in society, not to strike down positive law as repugnant.

(iii) Marriage and Repugnancy

Colonial administration in Africa made little or no pronouncements on local laws on marriage, nor was there a ruling that polygamy and dowry payment were repugnant. However, there were certain aspects of customary marriage which may have attracted the disapproval of the courts. Allott mentions the following:

- (a) Infant betrothal and all forms of marriage in which one or the other party has not given his or her full consent. This will include marriage by abduction.
- (b) Sexual prerogative of the husband, exercisable over the wife whatever the state of her health.
- (c) The absolute claim of the husband to legal paternity of any children born to his wife during the continuation of the marriage, whether or not the husband is the natural father.
- (d) The obligation on a widow to marry, or allow connexion with, the male relation of her deceased husband⁶⁹⁹.

⁶⁹⁸ *Re Adadevoh*, (1951) 13 W. A. C. A. 304. Per Verity, CJ: "...the encouragement of promiscuous intercourse must always be contrary to public policy." At p. 310.

(iv) Family Relations

The majority of cases regarding family relations concerned custody of children. In the Southern Rhodesian case of *Vela v. Mandanika and Magusta*⁷⁰⁰ the plaintiff and M were married under local Shona law. The plaintiff now sued the second defendant, who was now living with his wife, for the custody of the children born by M to the second defendant. Under Shona law, the plaintiff was entitled to bring such an action. However, the second defendant had already paid adultery damages to the plaintiff under Shona law and Russell, CJ, was obliged to observe that;

“In the circumstances of this case it seems to me that the husband would be acting contrary to natural justice if he refused reasonable extra payment of cattle or otherwise by the second defendant as damages.”

Thus, if extra damages were paid, custody would be awarded to the second defendant. Application of the repugnancy rule in this fashion is acceptable, as equity would have worked in this way in most jurisdictions. It would be against public policy to award custody of children to another man while the natural father is quite capable of playing his role as a father.

In the Nigerian case of *Edet v Essien*⁷⁰¹ the appellant Essien, paid dowry for B when she was still a child. Later, B married Edet instead after Essien had paid full dowry to her parents. Essien now claimed custody of the children who were the natural issues of the marriage between Edet and B, with the argument that he was “entitled to any children she may bear (to whomsoever) until the money I paid as dowry for her is refunded to me.” Carey, J, had no hesitation to observe that;

“...even assuming that the native law and custom as alleged by the appellant had been definitively established, I am inclined to think it should properly have been over-ruled in this case as being repugnant to natural justice, equity and good

⁶⁹⁹ Allott, p. 166.

⁷⁰⁰ 1936 S. R. 171.

conscience having regard to the circumstances”⁷⁰².

(v) Repugnancy and Property

In Eastern and Southern Africa, the repugnancy clauses were limited to personal relations but in West Africa, they applied largely to property rights⁷⁰³. Neither the British nor the French administrations regarded personal relations, such as polygamy, as repugnant. In West Africa, unjust dealings with property attracted the application of the formula "repugnant". Appeals from the native courts were heard by high courts presided over by English judges, who applied the principles of equity to strike down behaviour they regarded as "repugnant". Thus, rules of equity were applied as public policy rules, to limit the excesses of local African laws regarding property rights. For example, a claim by an owner of land who asserts his title to land when he had for many years acquiesced in its occupation by another was regarded repugnant⁷⁰⁴. Hence the owner of the land was merely prevented from enforcing his strict rights. In other words, it was against public policy to allow a landowner to enforce his strict rights where he had deliberately slept on them.

In the Ghana case of *Ani v Amoh*, Ollenu J, as he then was, held that "it would be against all principles of equity and natural justice" to deny a person of a farm cultivated by him on land which was later shared with the plaintiff⁷⁰⁵. Again, the same judge held in another case that the Ewe law by which family land became vested in the Stool (Crown) absolutely once it became "outskirts" land was repugnant, in other words, against public policy⁷⁰⁶. In similar vein, the old Ghanaian local rule that if a relative helped a person in building a home then the home became family property was held to be repugnant⁷⁰⁷.

In the Courts Act 1960 of Ghana, the repugnancy rule was omitted mainly because, in the

⁷⁰¹ (1932) 11 N. L. R. 47.

⁷⁰² At p. 48.

⁷⁰³ Allott; *New Essays in African Law*, 1970, p. 172.

⁷⁰⁴ *ibid*, at p.172.

⁷⁰⁵ (1959) G. L. R. 214.

⁷⁰⁶ *Ashiemoa v Bani* (1959) G. L. R. 130.

⁷⁰⁷ *Larbi v Cato* (1959) G. L. R. 35.

words of Bennion;

"It will be observed that another provision of S.87 (1), namely that a customary law will not be enforced if it is repugnant to natural justice, equity, and good conscience has not been reproduced. It was considered unfitting to the dignity of the indigenous laws of the people of Ghana to suggest that this repugnancy might continue to exist. For over 100 years, customary laws which were considered to be repugnant to natural justice, equity and good conscience have not been enforced because the law forbade their enforcement. It seems reasonable to assume therefore that such customary laws as remain will not offend in this respect",⁷⁰⁸.

B. "Ordre Public" in French Colonies

According to Francescakis, "ordre public" could be interpreted in one of two ways. First, the doctrine could be seen to comprise a set of rules of a given State, which by their very nature, would exclude the application of certain foreign laws. Second, the doctrine could refer to a number of fundamental principles which, even if there were no legislation, would operate to exclude the application of a foreign law, which would otherwise be applicable. Francescakis prefers the second interpretation⁷⁰⁹.

In the French African colonies, however, "ordre public" was applied to any rule of customary law which was found morally unacceptable, such as slavery, or which offended "...basic notions of justice, therefore considered contrary to the principles of French civilization"⁷¹⁰. Thus, the right of the head of the family to inflict severe corporal punishment on adult members of the family for adultery was considered contrary to French

⁷⁰⁸ Bennion, F. A. R; *The Constitutional Law of Ghana*, 1962, p. 416.

⁷⁰⁹ Francescakis; "Problèmes de droit international privé de l'Afrique noire indépendante", *1112 Rec. des cours (1964)*, p. 308 - 309. Cited hereafter as Francescakis.

⁷¹⁰ Salacuse, p. 60.

civilisation⁷¹¹. Similarly, the right of a Chief to banish a person permanently from his village was contrary to public policy⁷¹².

An example of how the courts applied public policy is demonstrated in a Mauritanian case which came before the courts in 1953⁷¹³. A truck struck and killed a man. The two men in charge of the vehicle were tried and found guilty of manslaughter, fined and imprisoned. After their release, the deceased's relatives demanded damages from the ethnic group to which the two men belonged. It was argued that in Moslem law, the members of the guilty men's ethnic group were collectively responsible, in civil law, for their acts. The court below granted damages under the Islamic law. The Court of Appeal however, held that the rule of collective responsibility was contrary to public policy.

In a society where there were no social services, it is safe to assume that the dependants of the dead man would be left destitute and the Islamic law cited in the case may have been meant to minimise their plight. However, the public policy rule in Islamic law, appeared to have conflicted with the French public policy rule. The court did not examine the public policy basis of the local rule but declared it contrary to public policy on the ground solely that it conflicted with French civilisation. What the court should have considered was the application of the rule in the present case. Was it against public policy to pay compensation to the family of the deceased? If collective responsibility were being evoked for purposes of, say, revenge killing, then clearly that would be contrary to public policy. However, the court declared collective responsibility, as a rule, repugnant, thus abolishing that rule altogether. It is the application of a rule that may be repugnant but not necessarily the rule itself. In applying the public policy of the forum the court should not seek to substitute the foreign law with its own. What may offend against public policy is not the foreign rule itself but as the foreign rule applies in the particular case before the court;

“What is usually in question, however, is not the foreign law in the abstract, but the

⁷¹¹ *N'Doumba Doualla*, Ch. Homologation, Cameroons, 1 February 1933, 43 Penant I, (1934), p.157.

⁷¹² Salacuse, p. 60.

⁷¹³ Judgment of 30 September 1953, 66 Penant I (1956), p. 80.

result of its enforcement or recognition in England in the concrete case"⁷¹⁴.

A rule may be declared repugnant, as a rule, only in a small number of cases where the rule is in breach of human rights conventions, such as the European Convention on Human Rights or the African Convention on Human and Peoples' Rights, or other international law norms⁷¹⁵.

The Mauritanian case mentioned above does not fall into the category of the *Kuwaiti Airways case*, for it is difficult to accept that the payment of compensation for unlawful killing could be viewed as a rule against international law or human rights. French colonial attitudes to inter-local conflict of laws in Africa were remarkably different from those of the British. In the first place French authorities never believed that there could be a genuine conflict situation between local African law and the law of France. They recognised only "conflits coloniaux", a situation in which French colonial legislation was always superior to local law and in case of conflict, local law always gave way. Thus, for French colonial policy, "ordre public", as understood in French law was inappropriate and a new terminology had to be found. The term that came to be applied throughout the colonial period was "ordre public colonial". The purpose of the doctrine was two-fold. First, to abolish local law or institutions which were regarded as anti-social, for example, servitude in lieu of repayment of a debt⁷¹⁶. Second, to foster the creation of the civil society⁷¹⁷. "Ordre

⁷¹⁴ *Dicey and Morris on Conflict of Laws*, Thirteenth Edition, 2000, p. 90.

⁷¹⁵ In the recent case of *Kuwaiti Airways Corp v Iraqi Airways Co*, [2002] AC 883, the House of Lords had the opportunity to consider the occasions when a court would refuse to recognise a foreign substantive rule of law. In that case the Iraqi Government, after the invasion of Kuwait in August 1990, directed the defendant to fly ten of the claimant's aircraft to Iraq. On 17 September, Resolution 369, which purported to dissolve the claimant and transfer its assets, including the aircraft, to the defendant, came into force. Because Iraq failed to comply with resolutions passed by the United Nations Security Council requiring its withdrawal from Kuwait by 15 January 1991, military action was taken against Iraq. Their Lordships held that it was legitimate for an English court to have regard to the content of international law in deciding whether to recognise foreign law. They came to the conclusion that the recognition and enforcement of the Iraqi Resolution 369, authorising Iraq to seize Kuwaiti aircraft, would be contrary to the United Kingdom's obligations under the United Nations Charter and manifestly contrary to the public policy of English law.

⁷¹⁶ Francescakis, p. 309.

public colonial" was therefore part of the French colonial system of social engineering and did not concern conflict situations in which a choice had to be made between French law and local African law. The British "repugnancy rules" were different. They applied to exclude or limit the application of certain local rules which conflicted with English notions of equity and justice and were not overtly political as the French doctrine was.

French colonial powers however, allowed one major exception to this sweeping rejection of local African laws and that was in commercial matters. The Decree of 1906 (for French West Africa) and of 1920 (for French Equatorial Africa, extended to Togo and Cameroon in 1924) permitted transactions between Africans "...selon les règles et formes coutumières *non contraires aux principes de la civilisation française*"⁷¹⁸. Thus, contracts according to customary law were permitted, as long as they did not contradict the principles of French civilisation. The dual effect of this law was that, the doctrine did not simply abolish an undesirable customary law rule, it also abolished the custom itself. Even in the colonial days, there were objections to this practice. Lampué, relying on Eliesco, thought that *ordre public colonial* should not be used to abolish customs which are contrary to French civilisation but should be used to promote the progressive development of customary law⁷¹⁹. Eliesco had spoken of *ordre public d'assimilation*, while Lampué spoke of *ordre public d'évolution*⁷²⁰. It is not altogether clear where the difference lies. If African legal systems are to evolve, there must be standards which they must set for themselves. It may not be difficult to guess that French standards are those Lampué had in mind for them.

According to Francescakis, modern views on *ordre public* differ considerably from those of the colonial era. Thus, Paul Lagarde argues that the purpose of *ordre public* must not be to eliminate undesirable foreign law but to realise reciprocal adaptation of foreign law and the law of the forum, with a view of achieving harmonisation⁷²¹. It is conceded that

⁷¹⁷ *ibid*, at p. 309.

⁷¹⁸ Emphasis mine.

⁷¹⁹ Eliesco; *Essai sur les conflits de lois dans l'espace sans conflit de souveraineté*, Thesis, Paris 1925.

⁷²⁰ *ibid*, at p. 311.

⁷²¹ *Recherche sur l'ordre public en droit international privé*, Paris 1959. Cited by Francescakis, p. 312.

harmonisation is a major goal in private international law, but it is doubtful that Lagarde had French colonies in mind when he recorded these views in 1959. It is more likely that he was speaking of the European situation rather than that of the colonies.

When French colonies became independent, it was accepted that *ordre public* must be interpreted to express African values. This goes for conflicts between African legal systems themselves and between European and African legal systems. For Francescakis, however, the change should be from *ordre public d'assimilation* to *ordre public du développement* to which the interpretation of all law must be subordinate⁷²². The purpose of the new concept is to promote "...un ensemble de principes préfigurant la société unitaire de l'avenir, société alignée sur une civilisation de type universaire"⁷²³. One is tempted to conclude that *civilisation de type universaire* is a European oriented concept which French colonial administration had attempted to impose on its colonies. While there might be universal principles of law, the role of the public policy is to limit or prevent the application of some foreign principles of law, not to impose foreign law on the forum.

According to Francescakis, the repugnancy clause in referring to "justice, equity and good conscience" could also play the role of *ordre public du développement*. However, repugnancy clauses were applied on an individual basis. There was no general principle underlying them, such as the "elevation" of African legal systems to the higher standards of a foreign legal system. The concept was applied by the court if it was felt that the person before it should not be allowed to benefit from a wrongful act. The aim was not to promote a superior principle.

Francescakis cites two cases from Cameroon, one of which is a good example of *ordre public du développement*, and the other of the general principle of law⁷²⁴. In the first case, the Supreme Court of Eastern Cameroon was faced with the customary law rule that the paternity of a child, regardless of the actual blood paternity, is attributable to the man who

⁷²² *ibid*, at p. 332.

⁷²³ *ibid*, at p. 333.

⁷²⁴ *ibid*, at p. 333.

paid the dowry⁷²⁵. The court ruled that this rule was against public policy. The court, according to Francescakis, preferred the notion of the modern family to the traditional African notion.

It is difficult to see the difference in the attitude of the Cameroonian court and the colonial approach. The Cameroonian court overruled the African rule for the same reasons that the French colonial court would have done. The repugnancy rule in the English colonies could have arrived at the same decision but on the ground that it would be unconscionable to award paternity to the man who paid the dowry, while in reality the mother was living with another man. In other words the traditional African rule is a rebuttable presumption that the man who goes through the marriage ceremony is also the father of the children of the marriage.

In the second case, the Supreme Court of Eastern Cameroon had to decide a case which turned on the customary law rule that a widow could not remarry until she had refunded the dowry paid by her deceased husband⁷²⁶. The general customary law rule was that a man who wanted to marry a widow or a divorced woman had to refund the dowry paid by the deceased or divorced husband. The court ruled that the widow was free to remarry without having refunded the dowry. The court based its decision on the general principles of law.

Again an outright rejection of the customary law rule, based on the general principles of law, is untenable. The case should have been judged on its own merits. If the widow wished to marry at the Registrar's Office or at church, then it would be unconscionable to impose a customary marriage law rule on her. However, if her intention was to enter into a traditional African marriage, then it would be correct to expect her to follow the relevant customary law rules.

It would seem that the French policy of assimilation is responsible for the intolerant interpretation of *ordre public*. While the repugnancy clause sought to limit unconscionable

⁷²⁵ Cour suprême du Cameroun oriental, 20 mars 1962. Recueil Penant 1962, p. 576.

behaviour, *ordre public colonial* went to abolish local law which conflicted with the notions *civilisation française*.

In France itself, public policy did not have the function of abolishing foreign rules which were contrary to morality or decency. For example, polygamy was recognised as long as none of the wives was a national of France⁷²⁷. So that what matters is not whether polygamy was, by itself contrary to public policy but whether a French national was involved in it. Apart from French nationality, there could be other links a French court may take into consideration to decide that the French public policy doctrine applied to the case. In a case decided in 1965, the question turned on whether the first wife in a polygamous marriage may petition a French court for divorce when the husband married a second wife⁷²⁸. In that case, the husband, an Algerian Moslem, had married the first wife at the Registrar's office in Algeria before Algeria became independent. The court accepted jurisdiction stating that since Algeria was French territory at the time of marriage, the first wife had links with France which permitted the court to apply French notions of public policy, and granted the divorce.

In a second case, the court appeared to rely on social developments to reach its judgment. The court accepted jurisdiction to grant the divorce on the grounds of "the Constitutional principle of the equality of the sexes"⁷²⁹. However, in this case, as in the first, the petitioner was a French national. Where all parties were foreigners, the courts reacted differently. The court refused to apply public policy to grant the divorce because both wives and the husband, were Moroccans⁷³⁰. According to Paul Lagarde, it was crucial that both wives were subject to the same law, namely, Islamic law. If the petitioner had been a French national, the court would have applied public policy and granted the divorce⁷³¹. One wonders whether it is merely French nationality which matters in this case or whether it is

⁷²⁶ Cour suprême du Cameroun oriental, 3 avril 1962. Recueil Penant 1963, p. 230.

⁷²⁷ Lagarde, Paul; "Public Policy", in *International Encyclopedia of Comparative Law – Private International Law*, p. 35.

⁷²⁸ Trib. gr. inst. Versailles, 31 March 1965.

⁷²⁹ Lagarde; p. 36. Trib. gr. inst. Orléans, 17 May 1984.

⁷³⁰ Cour Paris, 5 April 1900, (Court of Appeal for Paris).

the personal law which matters. Suppose the first wife were a French national but of the Moslem faith. Would nationality have taken precedence over her personal law?

⁷³¹ Lagarde; p. 36.

CHAPTER NINE

EVALUATION AND CONCLUSIONS

In this dissertation, the attempt has been made to demonstrate, first that the rules of private international law are applicable to inter-local conflict of laws in Africa. Second, that most of the colonial legislation on inter-local conflict of laws are still in operation. What this implies is that African lawyers have to constantly refer to the colonial rules, even where there are new rules, and compare the two sets of rules. Where the country has not enacted new rules, there would be no alternative but to refer to the old rules and apply the rules of private international law to them to aid interpretation, in order to make them suitable for modern needs.

What becomes immediately important is that new concepts of the connecting factor need to be developed. In the colonial period, the French applied the concept of status (*statut*)⁷³², while the British applied “native” and “non-native” in West Africa and “tribe” in East Africa⁷³³. These concepts will no longer be adequate to deal with a modern complex society, quite apart from the racial connotations implied in them. Modern societies are highly mobile and it may not always be easy to classify people according to “tribes”, especially in a time of increasing inter-ethnic marriages. In the same way, while “native” and “non-native” were used to classify Africans from Europeans in West Africa, they are of very little use in a sovereign state and give no guidance as to the law which may apply to the issue before the court.

In the circumstances there is the need to develop a new connecting factor which would be more useful for a modern society. The Ghana Choice of Law Rules of 1960 introduced the concept of “community” as the new connecting factor. The drafters did not indicate how the concept is to be interpreted but it is most likely that ethnicity is the basis of the concept. How else would “community” provide a connecting factor? There is still no case law on the issue but with progressive interpretation, “community” could come to provide

⁷³² See Chapter Five.

a supplementary connecting factor, such as "habitual residence", thus expanding the narrow ethnic base which the concept may now have.

The French colonial concept of *statut coutumier* is just as unhelpful as "native" or "tribe" in a modern society and needs to be replaced. Sénégal has replaced the concept with that of "nationality",⁷³⁴ but without any indication how the local law may be identified. Most probably, the rules of private international law would be helpful to identify the applicable local legal system.

The other major issue which has remained from the colonial era is the use of the repugnancy clauses in English-speaking African countries. As demonstrated in Chapter Eight under Public Policy, the clauses were expressed in various forms but acted as a public policy rule to limit or prevent the application of local legal rules which may be unequitable or socially damaging. The Ghana Choice of Law Rules of 1960 abolished the concept. While it is understandable that after more than one hundred years of judicial activity repugnant local laws would have been weeded out, there was no provision for the application of public policy as a concept. However, the omission did not mean that the inherent power of the court to refuse the application of a rule of law on the ground of public policy had been removed. Nevertheless, the repugnancy clauses have been reinstated by Section 49(1) of the Courts Act 1971⁷³⁵ but judicial activity has not yet attempted to shed light on the modern interpretation of the concept.

The French-speaking African countries have also inherited an interpretation of *ordre public* which is bound to pose problems. *Ordre public colonial*, which was applied in the colonial period is quite inappropriate today and there is need for judicial re-appraisal of the term.

There were major differences between French and British colonial administration, some of which have remained to this day. British colonialism in Africa appears to have been

⁷³³ See Chapter Six.

⁷³⁴ See Chapter Eight.

unplanned and was left mainly to private companies until administration became too complex and expensive for private companies to bear. In Eastern and Southern Africa, matters were quite different, for although it was again private companies which took the initiative to colonise Eastern and Southern Africa, these parts of Africa were meant for permanent European settlement. The result was that relations between European and African populations were far more hostile and intolerant than was the case in West Africa and this was readily reflected in colonial legislation. Very little attention was paid to choice of law problems as indirect rule, as practised in West Africa, was absent.

The French, on the other hand, had a clear idea of the purpose colonialism was to serve. The colonised African was to be assimilated although French law was not to apply fully to the *assimilé*, for it was "...dangereux de leur accorder tous les droits politiques et les libertés individuelles à la jouissance desquelles ils ne sont pas préparés."⁷³⁵ What became known as assimilation in French colonial policy actually began in good faith when revolutionary France passed legislation to extend the same privileges to all colonial peoples. The policy however degenerated into assimilation of the "native" into the "higher" French civilisation. Thus, the notion of status (*statut*) became an obsession for the French colonial administration. British colonial administration, in contrast, knew nothing of status and simply divided the population into "natives" and "non-natives"⁷³⁷. In West Africa, at least, race was not the deciding factor, for black people from the Caribbean were classified as "non-natives". Perhaps the word "native" was construed strictly according to its logical meaning but it is more likely that the English judge understood "native" to mean domicile of origin in the English sense, which could not be easily displaced. Most important is the fact, however, that the colonial administration did nothing to devise a policy on "natives".

Another notable difference between British and French administration was in their respective attitudes to the local legal systems they came to find. British administration did not impose English law on its colonies nor did it establish a hierarchy of legal norms. Unlike French rule, British rule in West Africa was established through treaties and agreements

⁷³⁵ Act 732.

⁷³⁶ Solus, H; *Traité de la condition des indigènes en droit privé*, 1927, p. 13.

with local chiefs and kings. These agreements usually contained provisions fully recognising the laws and customs of the people. Thus, local law and custom could be pleaded at any court in the West African colony. In Eastern and Southern African however, English colonial policy resembled that of the French.

A further area in which British and French attitudes differed substantially was in regard to Islam. When colonial administration was established, both the British and French soon found that Islam and traditional ways mixed freely⁷³⁸. However, there was a sharp difference between British and French attitudes to Islam in West Africa. The French went out of their way to control the "peril of Islam"⁷³⁹. This was due to several reasons but chief among them was the fact that many of the officials had come from Algeria, where the French had fought a bitter war for control. Secondly, many French officials held strong anti-clerical views which they extended easily to Islamic leaders.

British attitudes to Islam were not uniform and in West Africa, the administration hardly distinguished between Islamic law and "Native Law and Custom". Thus, Lord Lugard writes:

It is essential for Political Officers in Provinces where there is a considerable Muslim population, to have some knowledge of Muhammadan law, in order that their supervision of the Native Courts may be intelligent and effective, and in order that they may know how to observe and enforce native law and custom...⁷⁴⁰.

Thus, the two systems of law were one and the same to him, but Lord Lugard's language betrays the accommodating spirit which British administration adopted towards Islam and the local "native law and custom". In the Gold Coast, Anderson observes;

⁷³⁷ See Chapter Six.

⁷³⁸ Lewis, I. M; Ed, *Islam in Tropical Africa*, 1966, p. 74.

⁷³⁹ *ibid*, at p. 78.

⁷⁴⁰ Lugard; *Political Memoranda*. Cited in Anderson: *Islamic Law in Africa*, 1970, p. 172.

Islam applied in the Gold Coast, where it is applied at all, either as native law and custom or as a factor which is regarded by certain native courts as modifying the normal native law and custom in so far as Muslim litigants are concerned⁷⁴¹.

This British attitude may be due to the fact that there was no clear colonial policy from the beginning and policy was made as time went on.

The discussion on British colonial legislation on choice of law in Chapter Six is of importance if only because much of the approaches, if not the rules themselves, have remained in modern times. However, what becomes apparent is the difference in the British attitude to choice of law in East and West Africa. Section 19 of the Supreme Court Ordinance 1876, enacted for the Gold Coast was quite progressive for its times but limited largely to West Africa. The application of local (or customary law), became a right which was not to be taken away⁷⁴². Further, the legislation was made to cover a whole range of legal relations and not only status.

The British attitude to choice of law in Eastern and Southern Africa was different. The colonial policy was to settle these parts of Africa. There was no indirect rule and the choice of law process could not develop to the standards achieved in West Africa. While the West African legislation covered disputes between "natives" and "non-natives" and applied at the common law courts as well as the "native courts", the Eastern and Southern Africa provisions applied only between "natives" and only in "native courts".

The racial or ethnic element was absent in the West African legislation but was clearly noticeable in the Eastern and Southern African provisions. Efforts were made to define the races, so that a "native" was a black African, to the exclusion of Asians and whites⁷⁴³. In West Africa, the term "native" received a different meaning. There was no statutory definition of the term but the courts applied it to exclude the so-called "returnees", former

⁷⁴¹ Anderson, p. 251.

⁷⁴² "Nothing in this Ordinance shall deprive the Supreme Court...or shall deprive any person of the benefit of any law or custom existing in the colony."

⁷⁴³ See for example, Tanganyika Credit to Natives (Restriction) Ordinance. Cap 75.

slaves who had returned from the Americas⁷⁴⁴, from the benefit of customary law.

After Ghana's independence in 1957, it was recognised that the entire judicial system needed reviewing. As concerns the Supreme Court Ordinance 1876, certain provisions were no longer appropriate. The distinction between "natives" and "non-natives" was no longer appropriate in a sovereign state. Second, customary law applied only if invoked by one party, otherwise the common law applied. The new Courts Act 1960, was enacted to remedy these faults. Now, customary law was made to rank equal to the common law. Customary law now operated as a matter of law not as a matter of fact to be proved. The new provision also provided the courts with guidelines as when to apply the common law or customary law. Third, the new legislation created a connecting factor for all Ghanaians, namely the community from which they come.

However, it appears that old habits die hard. The Ghanaian provision was replaced by the Courts Act 1971⁷⁴⁵. Our old friend "natural justice, equity and good conscience" is back. As has been demonstrated above, regarding Public Policy, "natural justice" alone would be sufficient, while "equity and good conscience" were superfluous. The old colonial system still lives with us in independent Africa.

The history of choice of law in Africa has remained stagnant since 1960 and there are fewer and fewer inter-local conflict cases coming before the courts. This may be due to three reasons. First, it is likely that people are seeking advice before embarking on their activities, thereby eliminating conflicts situations. Second, the high cost of civil litigation may be discouraging people from going to court and is encouraging settling out of court or seeking arbitration. Third, it is just possible that judges are failing to classify cases correctly, thus being unable to recognise conflicts situations. Throughout the existence of the 1960 Choice of Law rules, this researcher has not found a single decision based on them. The Courts Act 1971⁷⁴⁶, which replaced these rules, has so far produced only one

⁷⁴⁴ See *Brown v Miller* (1921) F. Ct. '20 – '21.

⁷⁴⁵ Act 732. Reproduced as Appendix D.

⁷⁴⁶ Act 732, S.49 (1). Reproduced at page 207.

judgement based on it ⁷⁴⁷.

APPENDICES

Since Ghana's Courts Act 1960, was enacted to produce choice of law rules, a few other African countries have enacted similar acts. These are reproduced below for reference.

A

TANZANIA

Judicature and Application of Laws Ordinance, Cap.453 (as amended by the Magistrates' Courts Act 1963, No.55 of 1953, Cap. 537) s.9.

"9. Applicability of Customary Law. – (1) Customary law shall be applicable to, and courts shall exercise jurisdiction in accordance therewith in, matters of civil nature-

- (a) between members of a community in which rules of customary law relevant to the matter are established and accepted, or between a member of one community and a member of another community if the rules of customary law of both communities make similar provision for the matter; or
- (b) relating to any matter of status of, or succession to, a person who is or was a member of a community in which rules of customary law relevant to the matter are established and accepted; or
- (c) in any other case in which, by reason of the connection of any relevant issue with any customary right or obligation, it is appropriate that the defendant be treated as a member of the community in which such right or obligation obtains and it is fitting and just that the matter be dealt with in accordance with customary law instead of the law that would otherwise be applicable;

except in any case where it is apparent, from the nature of any relevant act or transaction, manner of life or business, that the matter is or was to be regulated otherwise than by customary law:

Provided that-

- (i) where, in accordance with paragraph (a), (b) or (c) of this sub-section

⁷⁴⁷ See *Mate v Amanor* (1973) G. L. R. 469. Reproduced at page 209.

customary law is applicable to any matter, it shall not cease to be applicable on account of any act or transaction designed to avoid, for an unjust purpose, the applicability of customary law; and

- (ii) nothing in this sub-section shall preclude any court from applying the rules of Islamic law in matters of marriage, divorce, guardianship, inheritance, waqf and similar matters in relation to members of a community which follows that law.

(2) It is hereby declared for the avoidance of doubts that-

- (a) a person may become a member of such a community as is referred to in subsection (1), notwithstanding he was hitherto a member of some other community (and whether or not any customary law is established or accepted in such other community), by his adoption of the way of life of the first-mentioned community or his acceptance by such community as one of themselves, and such adoption or acceptance may have effect either generally or for particular purposes;
- (b) a person may cease to be a member of a community by reason of his adoption of the way of life of some other community (whether or not any customary law is established or accepted in such other community) or acceptance by some other community as one of themselves, but shall not be treated as having ceased to be a member of a community solely by his absence therefrom.

(3) In any proceedings where the law applicable is customary law, the court shall apply the customary law prevailing within the area of its local jurisdiction, or if there is more than one such law, the law applicable in the area in which the act, transaction or matter occurred or arose, unless it is satisfied that the proper customary law to be applied is some other law:

Provided that the court shall not apply any rule or practice of customary law which is abolished, prohibited, punishable, declared unlawful or expressly or impliedly disapplied or suspended by any Ordinance or Act of Tanganyika or Act of the Common Services Organization."

Comment:

The Tanzania choice of law rules are unique in several ways. First, customary law is applicable only when all parties are from the same community or from different communities but the customary law rule on the issue is the same. Second, the rules are weighted in favour of the defendant [9 (1) (c)], while it is usually the plaintiff who is the aggrieved party. Third, the application of Islamic law is subject to the existence of a community that practices it. Islamic law is a personal law which is applicable only because a *person claims membership* of the religious group. That law would cease to apply to the person if he or she converts to another religion which also has a legal system. Thus, Islamic law would apply to a Moslem, for example in matters of succession, or marriage even if there were no Moslem community in the country.

B

KENYA

Judicature Act, No. 16 of 1967, s.3 (2)

“The High Court shall and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

Comment:

The Kenya rules are astonishingly brief and may be of very little help to the court. Unlike the Tanzanian rules, customary law is applicable if one or all parties are subject to it or affected by it. This may mean that customary law is applicable to non-Africans. In a multi-racial society such as Kenya, this should have been made much clearer and reliance should have been placed on issues involved in the case, rather than individuals being affected.

The repugnancy clause has been retained but then the provision goes on to say that all such cases (based on customary law), should be decided according to “substantial justice without undue regard to technicalities of procedure....” The only way to understand this provision is that the court is being invited to keep procedure to a minimum. How is this to be done without doing injustice to one of the parties?

C

UGANDA

Judicature Act, 1967, Act 11 of 1967, s. 8

“(1) Nothing in this Act shall deprive the High Court of the right to observe or enforce the observance of, or shall deprive any person of the benefit of, any existing custom, which is not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law.

(2) No party to a suit shall be entitled to claim the benefit of any custom if it appears from express contract or from the nature of the transaction out of which the suit or question has arisen that such party agreed that his obligations in connection with the transaction shall be regulated exclusively by law, other than by customary law.”

Comment:

The Ugandan provision is an unsatisfactory abbreviation of the Gold Coast Supreme Court Ordinance of 1876⁷⁴⁸. When Ghana adopted its new rules in the Courts Act 1960, the drafters gave reasons why the Ordinance was no longer adequate⁷⁴⁹. Thus, for example, local law applied only when a party claimed its application, instead of it being applicable as of right in all personal matters. The Ugandan provision has retained this shortcoming. It has also retained the “express contract” expression which caused so much discussion in the Gold Coast.

⁷⁴⁸ No. 4 of 1876.

⁷⁴⁹ See Chapter Seven (III).

D**GHANA****Courts Act 1971 (Act 732), S. 49 (1)**

The Courts Act of 1971 introduced new choice of law rules in Section 49(1) of the Act, apparently to correct the inadequacies of the 1960 rules. It provides as follows:

“49 (1) Subject to the provisions of this Act and any other enactment, the Court when determining the law applicable to an issue arising out of any transaction or situation, shall be guided by the following rules in which references to personal law of a person are references to the system of customary law to which he is subject or to the common law where he is not subject to any system of customary law:

Rule 1. An issue arising out of a transaction shall be determined according to the system of law intended by the parties to the transaction to govern the issue or the system of law which the parties, from the nature or form of the transaction must be taken to have intended to govern the issue.

Rule 2. In the absence of any intention to the contrary, the law applicable to an issue arising out of the devolution of a person's estate shall be the personal law of that person.

Rule 3. In the absence of any intention to the contrary, the law applicable to an issue as to title between persons who trace their claims from one person or group of persons or from different persons all having the same personal law, shall be the personal of that person or persons.

Rule 4. In applying rules 2 and 3 to disputes relating to titles to land due regard shall be had

to any overriding provision of the law of the place in which the land is situated.

Rule 5. Subject to the foregoing rules, the law applicable to any issue arising between two or more persons shall, where they are subject to the same personal law, be that law; and where they are not subject to the same personal law, the Court shall apply the relevant rules of their different systems of personal law to achieve a result comfortable to natural justice, equity and good conscience.

Rule 6. In determining any issue to which the foregoing rules do not apply, the Court shall apply such principles of the common law or customary law, or both, as will do substantial justice between the parties, having regard to equity and good conscience.

Rule 7. Subject to any direction that the Supreme Court may give in exercise of its powers under Article 107 of the Constitution in the determination of any issue arising from the common law or customary law the Court may adopt, develop and apply any such remedies from any system of law (whether Ghanaian or non-Ghanaian) as appear to the Court to be efficacious and to meet the requirements of justice, equity and good conscience.

Subject to the provisions of this Act and any other enactment, such rules of law and evidence (including the rules of private international law) as have been applicable in proceedings in Ghana shall continue to apply, without prejudice to any development of such rules which may occur.”

Comment:

There are major differences between the new rules and those of 1960. The 1960 rules had a clear hierarchical order, thus rules 2 and 3 applied subject to rule 1 etc. The 1971 rules do not have a clear hierarchy. Thus, rule 4 starts with “in applying rules 2 and 3...”, while rule 5 is subject to the foregoing rules. Rule 6 is available “in determining any issue to which the foregoing do not apply.”

The most perplexing provision is rule 7, which empowers the court to apply a remedy from any legal system, Ghanaian or non-Ghanaian, where a local legal system fails to provide one. It is difficult to imagine the situation where a legal system provides a legal basis for a claim and yet, fails to provide a remedy which must go with it⁷⁵⁰.

There are other ambiguities in the rules. Rule 4 states that in applying rules 3 and 4 relating to land, due regard shall be had to any "overriding provisions" of the law of the place in which the land is situated. It is not clear what "overriding provisions" are supposed to mean. The 1960 rules were specific on transfer of title to land, thus rules 1 and 4 provided adequately for transfer of land *inter vivos* and upon death intestate. This is partially a restatement of the local legal position that a person cannot dispose of property in which others have an interest without the consent of those others⁷⁵¹.

The 1960 rules left out the concept of "natural justice, equity and good conscience" but for some reason, it has been brought back in rule 5 and is repeated in rule 6 as "substantial justice" and again in rule 7 as "requirement of justice, equity and good conscience." The meaning of this provision has been discussed above⁷⁵² and it was argued that the expression "natural justice" alone would be quite sufficient and that "equity and good conscience" were superfluous. It is no longer necessary to remind the judge that the rules of equity should be observed.

The difficulties in applying the new rules quickly became apparent when the case of *Mate v.*

⁷⁵⁰ In the English case of *Phrantzes v Argenti*, [1960] 2 QB 19, the plaintiff, daughter of the defendant, brought an action to compel her father to pay her husband a dowry, as Greek law demanded and for the court to assess the level of the dowry due. The court held that while Greek law on the subject was recognised and would have been enforced if the Plaintiff had come before the court with a judgment debt, the common law did not possess the mechanism to enforce "a right to obtain an order condemning someone to enter into a contract in a particular form with a person not even a party to the proceedings". At p. 3. Thus, the English court could not have borrowed a Greek remedy of compelling a third party into a contract because the common law did not know such a remedy.

⁷⁵¹ *Nelson v Nelson* (1951), 13 W. A. C. A. 248.

⁷⁵² See Chapter Eight, Public Policy.

*Amanor*⁷⁵³ came before the courts. In that case, H and W were married under the local law of the Krobo but lived in Accra, about one hundred kilometres away. As they were in financial difficulties, H. consented that W could work at a hotel at Krobo Odumase, owned by the defendant. H later withdrew his consent for W to continue to work at the hotel and asked her to resign. W refused to resign. H then asked the defendant to terminate W's appointment and when he refused to do so, H complained to the local chief. An arbitration ensued as a result of which the defendant was ordered to discharge W from his services. W rejoined her husband in Accra but promptly returned to the same employment without her husband's consent.

H now sued at common law alleging that the defendant induced or enticed his wife away from him. Abban, J, sitting at the High Court in Accra, held that the Courts Act 1971, Section 49(1) Rule 5 had made the application of customary law obligatory in tort suits between Ghanaians whose personal law was the same system of customary law. Therefore, the suit could only be brought under Krobo law. However, although the judge could find no rule in the applicable Krobo law which recognised the tort of inducement or enticement of a wife, he reasoned that the combination of rules 6 and 7 had given the court "unfettered discretion" to adopt and apply remedies available in any legal system, where no remedy was available under the local legal system, with a view to achieving substantial justice between the parties. Thus, the judge felt he had to apply the common law tort of enticement because that piece of legislation was still on the statute book of Ghana, although, he admitted, such an action was clearly not in keeping with the times and had been abolished in English law.

Rule 5, which governs tort cases, states quite clearly that where *all parties* in the dispute are subject to the same personal law, that law *shall apply* and if they are not, then the relevant rules from the two customary law systems are to apply. It is only when none of the parties is subject to a customary law system that rule 6 could be called in aid. A combination of rules 6 and 7 do not leave the judge that "unfettered discretion" to apply any legal rule he pleases. Furthermore, there is nothing in the rules which suggests that the court may (or is obliged to) apply a law from another legal system if the plaintiff's claim is unknown to the

⁷⁵³ (1973) G. L. R. 469.

applicable legal system. Such a cause of action would seem to suggest that there were *lacunae* or 'gaps' in the applicable legal system and the judge is called upon to fill those gaps.

The argument is faulty, for the judge's role is to interpret *existing law* and where the claim to be determined is non-existent in the applicable legal system, the judge must interpret the law by dismissing the case on the ground that the prevailing law does not stipulate the asserted obligation. If a plaintiff were to claim damages for injury to honour in England, the claim would almost certainly be dismissed as unknown to English law. It would be quite wrong for the English court to borrow a remedy from another legal system which recognises such a claim⁷⁵⁴.

The provision in rule 7 is novel, not only to local Ghanaian legal systems but also to the common law. The sole guidance given the judge is that the remedy chosen must be 'efficacious' and must meet the 'requirements of justice and good conscience'. The direction is far too vague for the judge to rely on. It would seem that the absence of a clear hierarchy in the rules has misled the judge into overlooking the application of rules 5 and 6, which are exhaustive for tort purposes and thus make rule 7 redundant in this particular case. At best rule 7 may be seen as a residuary rule for the court to fall back on in case rules 1 to 6 fail to provide a remedy but rule 7 on its own should not have been allowed to take precedence over rules 1 to 6.

⁷⁵⁴ *Phrantzes v Argenti* (1960) 2 QB 19. The position is the same in the United States, *Slater v Mexican National Rail Co*, (1904) 194 US 120.

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